

Chapter XXVI.

GENERAL ELECTION CASES, 1840 TO 1850.

1. The "Broad seal case" in the Twenty-sixth Congress. Sections 791-802.
 2. Cases from the Twenty-sixth to the Thirty-first Congresses. Sections 803-820.¹
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791. The election case of the New Jersey Members in the Twenty-sixth Congress, called the "Broad seal case."

An instance wherein the House, at the time of organization, declined to give *prima facie* effect to credentials in due form, but impeached by documents relating to the fact of election.

The House having historic knowledge of an election contest, referred the subject to the committee with instructions, although neither party was petitioning.

The House having, of its own motion, decided to examine an election, a copy of the resolution was served on the parties.

On December 2, 1839, when the House met to organize for the Twenty-sixth Congress, a question arose as to the right to seats of five persons claiming seats from New Jersey by virtue of the certificate which each bore from the governor of the State. These credentials were in due form and under the seal of the State, whence arose the designation of the resulting proceedings as the "Broad seal case." In opposition to the claim of the duly certified claimants there appeared five other claimants, with documents tending to show their actual election. After a long struggle, in the course of which the five certified claimants were not permitted to vote for Speaker, the House was organized² and proceeded to business, five of the New Jersey seats remaining vacant, and there being ten claimants thereto.

¹ Additional cases in this period, classified in different chapters, are:

Twenty-eighth Congress, cases of New Hampshire, Georgia, Mississippi, and Missouri Members. Section 309.

Twenty-ninth Congress, Newton, Arkansas. Sections 489, 572.

Twenty-ninth Congress, Baker and Yell. Sections 488, 572.

Thirtieth Congress, Sibley, Wisconsin. Section 404.

Thirty-first Congress, Gilbert and Wright, California. Section 520.

Thirty-first Congress, Babbitt, Deseret, Section 407.

Thirty-first Congress, Smith and Meservey, New Mexico. Section 405.

Thirty-first Congress, Perkins and Morrison, New Hampshire. Section 311.

² See section 103 of this work for a more detailed account of the proceedings in organization.

On January 7, 1840,¹ Mr. John Campbell, of South Carolina, who was chairman of the Committee on Elections, offered under suspension of the rules the following resolutions:

Resolved, That all papers or other testimony in possession of or within the control of this House in relation to the late election in New Jersey for Representatives in the Twenty-sixth Congress of the United States be referred to the Committee of Elections, with instructions to inquire and report who are entitled to occupy, as members of this House, the five contested seats from that State.

Resolved, That a copy of this resolution be served on [naming the ten claimants], all citizens of New Jersey, claiming to be Representatives from that State in this Congress; and that the service be made upon each gentleman personally or by leaving a copy at his usual residence.

The rules being suspended and the resolution admitted for consideration, Mr. John Bell, of Tennessee, proposed a substitute amendment as follows:

That Philemon Dickerson, Peter D. Vroom, William R. Cooper, Daniel B. Ryall, and Joseph Kille, who are in attendance claiming to be admitted to sit and vote in this House as Representatives from the State of New Jersey, are not, and can not be, legally and constitutionally, Members of this body, until the regular returns or certificates of election granted to five other duly qualified persons by the governor and council of said State, in the exercise of the authority vested in them by the laws of said State, passed in conformity with the Constitution of the United States, shall have been set aside, or adjudged void, upon due investigation had, in the form and manner prescribed by the usages of the House.

Resolved, That the House having decided that John B. Aycrigg, William Halsted, John P. B. Maxwell, Charles C. Stratton, and Thomas Jones Yorke, the persons having the regular and legal certificates of election, shall not be admitted to sit in this House and vote as other Members until it shall have been established, by sufficient proof, that there was no fraud, mistake of the law, or other error, made or committed by the governor and council of New Jersey in the returns or certificates of election granted as aforesaid; and said decision being contrary to the usual practice of the House in such cases, the Speaker be directed to notify the governor and council of New Jersey that the commissions issued by him, according to the laws of said State, to John B. Aycrigg, John P.B. Maxwell, William Halsted, Charles C. Stratton, and Thomas Jones Yorke have not been deemed sufficient by the House to authorize those holding the same to be sworn in as Members of this House; also the proceedings of the House in the premises, to the end that the people of said State may be duly informed of the causes which have for the present deprived them of the services of five of the Representatives to which they are entitled by the law and Constitution.

Resolved, That the returns and all other papers or testimony in possession of the House relating to the five vacant seats in the New Jersey delegation be referred to the Committee of Elections; that said committee proceed to examine the returns and all other testimony which may be submitted to them, according to the rules and orders of the House, and that said committee first decide and report to the House who are entitled to sit and vote as Members by the returns.

The resolution and proposed substitute were debated at length.² Mr. Campbell, in presenting his resolution³ stated that it was usual for gentlemen contesting seats to bring their claims before the House by petition or memorial. But as they had waited from day to day without any movement from either of the parties he conceived it his duty as chairman of the Committee on Elections to bring the matter before the House.

Some objection was made to this view. Mr. Isaac Fletcher, of Vermont, thought no question could arise until the claimants should present themselves to be sworn, meaning evidently the five not having certificates, as those having certificates had demanded to be sworn and had been refused. Mr. John Quincy Adams, of

¹ First session Twenty-sixth Congress, Journal, pp. 185, 187; Globe, pp. 105, 106.

² Globe, pp. 105, 108, 109, 113, 118, 119.

³ Globe, p. 105.

Massachusetts, thought there was no objection to the resolution, but conceived that first the Speaker should be directed to inform the executive of New Jersey that his commissions had been rejected. Mr. Millard Fillmore, of New York, raised a question as to whether or not there was any evidence in possession of the House. He did not think there could be any unless it had been referred to it. Furthermore, was the whole question to be referred, or only the question as to who in the first instance were to be regarded as sitting Members.

Mr. Campbell stated that the credentials were already in possession of the House, and that the Committee on Elections would expect to decide not only as to final right, but also as to who were entitled to the returns.

On January 13¹ the House, without division, ordered the previous question, thereby, according to the practice of that date, removing from before the House the amendment proposed by Mr. Bell. Thereupon the House—by a vote of yeas 110, nays 68—agreed to the resolutions proposed by Mr. Campbell.

792. The “Broad seal case,” continued.

The Elections Committee, at the outset of an investigation, called on the claimants to state in writing the grounds of their respective claims.

Position of the claimants relating to prima facie right in the “Broad seal case.”

The Committee on Elections met on January 14, 1840.² It was constituted as follows: Messrs. John Campbell, of South Carolina; Millard Fillmore, of New York; Francis E. Rives, of Virginia; William Medill, of Ohio; George W. Crabb, of Alabama; Aaron V. Brown, of Tennessee; Charles Fisher, of North Carolina; Truman Smith, of Connecticut, and John M. Botts, of Virginia.

This committee at the outset received from the Clerk of the House certain papers: (1) The credentials by the governor; (2) remonstrance of J. B. Aycrigg et al. (3) proceedings of the governor and privy council of New Jersey; (4) depositions; (5) returns, tabular statements, certificate of the secretary of state of New Jersey, etc.

It was ordered by the committee that the various claimants be notified of the organization of the committee, and at a later session it was.

Resolved, That the claimants to the vacant seats from New Jersey be requested to lay before the committee, in writing, the grounds of their respective claims to said seats, and that they be confined to a statement of such facts as they propose to prove by testimony before the committee, together with any legal points they may choose to submit.

In these statements of grounds the fundamental questions involved in the case were set forth.³ The claimants who bore the regular credentials urged—

The undersigned, Representatives of the State of New Jersey in the Twenty-sixth Congress, protesting, in behalf of the State and themselves, against all acts of the other Members of the House of Representatives, as well since as before the election of a Speaker, in derogation of the rights of said State and of her Representatives, and disclaiming, now and ever, all acquiescence therein; and also respectfully protesting against so much of the resolution adopted by the Committee of Elections on the 15th instant as implies that the seats of the Representatives of New Jersey are vacant, and designates the undersigned as claimants-in compliance with the request in said resolution, lay before the committee the following as the grounds upon which they are Members of the House of Representatives, and claim to be recognized as such:

¹ Journal, pp. 195, 196.

² House Report No. 506.

³ Report No. 506, pp. 3, 6, 8, 9.

That the undersigned have received, and now produce, the commissions of the State of New Jersey, under the great seal and signed by the governor, constituting them Representatives of said State in the Twenty-sixth Congress; which commissions, thus duly authenticated in the manner prescribed by the laws of the State, are the only return and evidence of membership recognized by said laws.

That the said commissions were given, in conformity with said laws, to the persons whom the governor and privy council, after casting up the whole number of votes from the several counties, determined to have the greatest number of votes from the whole State.

That these commissions, by the Constitution of the United States, by the laws of New Jersey, by the uniform and unvarying practice of Congress since the origin of the Government, by the usage of all similar bodies, and by the very principles upon which representative governments are organized, are sufficient and conclusive evidence of right, until set aside by the House of Representatives in the exercise of its constitutional powers.

That they have never been set aside by any competent authority and have never yet been impeached by any legal evidence whatever.

The undersigned have received notice from Messrs. Philemon Dickerson, Peter D. Vroom, Daniel B. Ryall, William R. Cooper, and Joseph Kille that they intend to contest the right of the undersigned to seats as Members of the Twenty-sixth Congress; and are also informed (though without notice from them) that the ground of their claim is that the votes of the townships of Millville, in Cumberland, and of South Amboy, in Middlesex County, which were not legally returned, should be counted; and that these votes, added to those legally returned, would give them a majority. The undersigned, therefore, apprise the committee that, in any investigation respecting the election beyond the credentials by which they appear here as Members, they will claim the right to prove that they were duly elected Members of the House of Representatives by a majority of all the legal votes at said election, as well as by a majority of the votes legally returned.

The claimants who had not received credentials presented their claim in part as follows:

We claim those seats, and we now propose to prove that at the election holden in New Jersey on the 9th and 10th days of October, A.D. 1838, we received the greatest number of votes from the whole State. We, having the majority of votes, respectfully insist that, by the returns of the several election officers then made, we were entitled to the commissions from the governor, and we are now entitled to occupy the seats as Members of this House.

As there appears to be some difference of opinion as to the meaning of the terms elections and returns, as used in the Constitution of the United States, it is proper for us at this time to express our views upon the subject, in order that we may not be misunderstood.

We consider that the elections are made by the people, and the returns by their agents. The election ceases when the ballot box closes; the people have then done their duty and made their election. It then becomes the duty of their agents, appointed by law for that purpose, to make the returns; and the whole object of those returns is to communicate to this House the true result of such election. A contest of election involves an inquiry into the legality and regularity of the proceedings up to the time of the close of the ballot box; and a contest of the returns involves an inquiry into the legality and regularity of the proceedings of the different officers, in communicating the result of such election to this House. By the laws of New Jersey the election officers of each township make their returns to the county clerks of the several counties; and they make their lists, or returns, to the governor; and upon these he issues his commission.

For the purpose of establishing the fact that at the election held for Members of the Twenty-sixth Congress we received the greatest number of votes from the whole State, we offer the certificate of the secretary of state of the State of New Jersey, under his seal of office, showing that upon an examination of the returns in his office, including the returns of the townships of South Amboy, in Middlesex, and Millville, in Cumberland County, we had a majority of all the votes in the State; and as the foundation of that certificate we also offer a certified copy of the statement of votes upon which the governor and his council made their determination, embracing the votes of all the State except those of South Amboy and Millville; and also copies of the returns from those two townships, as filed in

the office of the secretary of state, and referred to by him in his general certificate; and as further evidence of the returns of those two townships we offer copies of the returns made by the officers of the elections of those townships to the clerks of the said counties, and by those clerks duly certified under their respective hands and seals of office.

These papers were laid before the Clerk of this House before the meeting of Congress; and are now offered as legal evidence of the fact that we received the greatest number of votes from the whole State.

* * * * *

In further support of our claim, and for the purpose of making its truth and justice more manifest, we offer to the committee, for their consideration, a sworn copy of the minutes of the proceedings of the governor and his privy council upon this case, by which it appears that the returns from South Amboy and Millville were laid before the council by the governor himself, and were referred to a committee, with the other returns from the State; that they were rejected because they were not transmitted by the clerks of the said counties of Cumberland and Middlesex, and for no other reason; and that they proceeded to count up the votes of the State, excluding those from the said townships of South Amboy and Millville, and determined that Mr. Aycrigg and his associates were duly elected Members of the Twenty-sixth Congress, although it appeared from the returns before them that the votes of said townships, if counted, would have changed the result.

* * * * *

By the laws of New Jersey the governor and his privy council shall “determine the six persons who have the greatest number of votes from the whole State;” “which six persons the governor shall forthwith commission under the great seal of the State.” Such are the words of the act. The governor in his opinion to his privy council uses the following language: “What does the law direct the governor to lay before the privy council? The said lists, referring manifestly to the lists transmitted by the county clerks, which have been mentioned immediately before. What are the governor and privy council to do with the lists thus laid before them? They are to cast up the votes. When this is done, what are they to determine? Who are entitled, under all the circumstances, to seats in Congress? No; but they are to determine the six persons who have the greatest number of votes. No language can be plainer. Was it ever intended by our laws to make the governor and his privy council the arbiters of an election? There is no power conferred on us to examine a single witness, to send for persons or papers, or to take one step toward a judicial investigation. If we may go behind the return of the county clerks to those of the township officers, why should we stop there? We may by the same authority and with equal reason undertake to examine the proceedings of those township officers at the polls. Who has ever dreamed of the governor and privy council of New Jersey setting themselves up to decide on any of these matters? They always have been and, from the very words of the act, must be confined to the clerk’s returns and to the duty of casting up the votes.” Here we have the law and the governor’s opinion on that law; from both of which it is most manifest that the duty of the governor and council was to determine, in the first place, the six persons who had the greatest number of votes from the whole State. It is upon that determination that the governor is authorized to issue his commission; and yet, upon looking into their own record, it appears that they did not determine the six persons who had the greatest number of votes from the whole State, but, in the teeth of the governor’s opinion and of the law, they determined who, “under all the circumstances, were entitled to seats in Congress,” and made their adjudication in the following words: “We do determine that John B. Aycrigg, John P. B. Maxwell, William Halsted, Joseph F. Randolph, Charles C. Stratton, and Thomas Jones Yorke are duly elected Members of the Twenty-sixth Congress of the United States,” when they knew, and their own record shows, that those gentlemen had not the greatest number of votes and that they were not duly elected Members of the Twenty-sixth Congress of the United States. We may at this time with great propriety repeat the words of the governor: “Who ever dreamed of a governor and privy council in New Jersey setting themselves up to decide any of these matters?”

793. The “Broad seal case,” continued.

In the “Broad seal case,” the Elections Committee, while admitting the prima facie effect of regular credentials, at first decided to investigate only final right.

In the examination incident to the “Broad seal case” the Elections Committee held votes received by authorized officers acting legally as *prima facie* good.

Instance wherein testimony in an election case was, in the absence of law or rule, taken by direction of the committee.

The committee, after the statements of the parties had been filed, proceeded to determine the scope of the inquiry. The minority views, filed later and signed by Messrs. Fillmore, Botts, Crabb, and Smith, give a résumé¹ of these proceedings:

These statements were not completed and laid before the committee until the 23d day of January, and it was obvious from an examination of them and of the resolution of the House referring the matter that the committee must pursue one of two courses—that they must either make a preliminary report awarding the vacant seats to one set of claimants until the whole subject could be investigated and the final right determined, or proceed to a full and thorough investigation of the subject and decide upon the merits of the whole case at once.

Eight members of the committee out of nine were in favor of submitting a preliminary report by which the vacant seats would have been filled, but they differed as to the basis on which the report should be founded. We entertained the opinion that it should be based on the legal returns of the only authority recognized by the laws of New Jersey as authorized to grant the return, that being the highest *prima facie* evidence of an election that could be presented, and which it has ever been the practice of Congress and of all other legislative assemblies to treat as conclusive in the first instance; and accordingly one of our members submitted the following proposition:

“Resolved, That this committee will now proceed to ascertain and determine who have the returns, according to the Constitution of the United States and the laws of New Jersey, which will authorize them to occupy the contested seats from that State until the question of ultimate right can be determined.”

Other gentlemen of the committee, differing with us in opinion, thought that the executive commissions should be entirely overlooked, and that it was the duty of the committee to proceed at once to ascertain which party had received a majority of all votes, good and bad, given at the polls, and were therefore entitled to the returns, and submitted amendments to that effect.

This view of the subject we deem utterly fallacious, but time will not permit us to enter into the argument. The consequences resulting from this novel doctrine are well illustrated by the scenes of disorder and confusion which resulted from its application at the present session—scenes in a high degree discreditable to the House and endangering the peace of the country and which must greatly impair the confidence of all right-thinking people in the perpetuity of our free institutions.

Upon a careful examination of the laws of New Jersey we ascertained that the governor and privy council were mere ministerial officers, charged with a certain specified duty, plainly set forth, viz, to ascertain and determine which six of the persons voted for received the greater number of votes according to the returns made by the clerks of the several counties of the State. That the individuals who were commissioned by the governor of New Jersey as the Representatives of that State had received the greatest number of votes thus returned according to law was a fact not disputed or denied.

Finding this difference of opinion, however, to exist in the committee as to the basis of a report, the mover of the original proposition modified the same with the view of reaching the sense of the committee, and merely proposed, in general terms, that a preliminary report should be made designating the individuals who should occupy the vacant seats until the question of ultimate right could be determined, thus manifesting a disposition to have the seats filled as the committee and the House might determine according to their sense of justice and propriety. But, from an apprehension, as we presume, that they could not succeed in the untenable ground they had taken, that the report should be made favorable to those who barely obtained a majority of all the votes, legal and illegal, given at the election, the modified resolution was likewise resisted and a substitute offered which proposed to inquire who were entitled to be returned as Members-elect, evidently on the ground of good and bad votes, for when it was proposed to insert an amendment which would make the case turn on the majority

¹ Report No. 506, p. 274.

of legal votes such amendment was strenuously resisted and carried only by the casting vote of the chairman. This resolution, as ultimately adopted, was as follows:

Resolved, That this committee will now proceed to ascertain which five of the ten individuals claiming the five vacant seats from New Jersey received a majority of legal votes, and therefore are duly elected Members of the Twenty-sixth Congress from that State, according to the Constitution of the United States and the laws of New Jersey."

Thus it will be perceived that the committee came to an early determination to investigate the ballot boxes and ascertain who were entitled to the seats on the ground of having received a majority of legal votes, in which decision we acquiesced.

The minority then go on to describe how the committee made decisions that the certificates of the governor of New Jersey were *prima facie* evidence that the holders were entitled to the seats; but, after reconsidering a former action, finally agreed on the following:

Resolved, That the credentials of the governor of New Jersey are *prima facie* evidence that they who hold them are entitled to seats, but, being questioned on the ground that all the votes polled were not counted, this committee will now proceed to inquire and ascertain who of the ten claimants for the five contested seats received the greatest number of votes polled in conformity with the laws of New Jersey, at the late election for Members of Congress in that State.

Resolved, That all votes received by authorized officers acting in conformity with the laws are *prima facie* legal; but it being alleged and offered to be sustained by evidence that pluralities were obtained by means of illegal votes and frauds perpetrated on the ballot box, this committee will admit evidence as to the truth of these allegations, and inquire who of the claimants received the greatest number of legal votes, in conformity with the Constitution of the United States and the laws of New Jersey, and therefore are entitled to occupy, as Members of the Twenty-sixth Congress, the five contested seats from that State.

Resolved, That the adoption of the above resolutions does not preclude this committee from reporting the facts and testimony, with its opinion thereon, for the consideration of the House, at any stage of its proceedings that it may deem it expedient to do so.

Resolved, That a copy of the foregoing resolutions be communicated to each of the claimants to the vacant seats from New Jersey, and that they be informed that the committee has reconsidered and indefinitely postponed the resolutions furnished them on the 28th instant, and that this committee will hear them at their committee room on Saturday, the 1st of February, proximo, at 10 o'clock in the forenoon, on the subject of the measures which should be adopted to obtain the evidence applicable to the inquiry before the committee.

The parties accordingly met again in the committee room, and, after they were severally heard, the committee adopted the following resolution:

Resolved, That we will now take up the testimony which has been referred to this committee in the New Jersey case, and if, during the investigation of the subject, it shall be desired by either party to furnish additional testimony, that then the parties be allowed such reasonable time as may be determined by the committee, to take such additional testimony, in the manner prescribed by the laws of New Jersey relating to contested elections, unless the parties agree upon some other mode which may be sanctioned by the committee.

Thus, it will be perceived, that before a paper purporting to be testimony in this case was opened by the committee, it was resolved to decide upon its competency alone; and it was further resolved that time should be allowed either party requiring it, to take additional testimony, with a view, as we supposed, of ascertaining the whole truth touching the merits of the election.

The minority views describe briefly how the committee took up and decided on the admissibility of evidence, rejecting much as *ex parte*. Then, at the suggestion of the parties, the committee agreed to the following:

Whereas the people of the State of New Jersey are at present deprived of five-sixths of their representation in the House of Representatives, and it being highly expedient that a decision of the question between the several claimants to the five contested seats in the House aforesaid be made as speedily

as practicable consistent with due investigation and deliberation, and the contestors having alleged that, if the committee go into an investigation of the question of who received the plurality of legal votes they desire time also to take testimony; and J. B. Aycrigg, William Halsted, and others, having made application to the committee for time to take further evidence to maintain their right to seats in said House: Therefore

Resolved, That the chairman be requested to notify the several claimants aforesaid that this committee will not proceed to a final decision upon the question of ultimate right depending before them until the second Monday in April next, at which time the committee will expect the proofs to be closed and will not receive any testimony taken by either of the parties after that time, but nothing in this resolution shall prevent this committee at any time before that day from taking up and deciding said case, if the parties shall declare themselves ready with all their testimony.

The minority views then proceed:

In justice to the chairman of the committee it should be stated that he indicated to the committee an anxious wish that the time allowed for the completion of the proofs should be abbreviated, with a view to bring the case, upon its merits, before the House at as early a day as practicable; and three of the undersigned, in deference to the opinions and feelings of the chairman, cooperated with him in an effort to procure a reconsideration of the above resolution, which was defeated by the votes of the other members of the committee.

Nothing now remained to be done but to carry out the original plan as exhibited in the said resolutions, and accordingly the following resolution was offered by one of the undersigned and adopted by the committee:

Resolved, That the parties to the contested election from the State of New Jersey be, and they are hereby, authorized to take the testimony of such witnesses as either of them may desire to examine, by depositions in conformity with the laws of that State in force at the time of taking any such testimony, on the subject of contested elections in similar cases: *Provided*, That the parties may, by any agreement under their hands, regulate the mode of giving notice and other matters of form at their discretion."

Soon after the adoption of these resolutions the commissioned Members left the city for the State of New Jersey to finish taking their evidence, where they still remain. We did not anticipate, nor had we an intimation from any quarter, that further proceedings in the case were contemplated, either in the committee or the House, until the expiration of the time allowed the parties to complete their evidence.

794. The "Broad seal case," continued.

Instance wherein the House ordered its committee to report on prima facie right before ascertaining final right.

Instance wherein the House, disregarding the certificate of the governor, ascertained prima facie right on the returns of the local officers.

The Elections Committee, in determining prima facie right, declined to open evidence relating to final right.

The Elections Committee declined to consider ex parte evidence in determining prima facie right.

Overruling the Speaker, the House, in 1840, decided to receive as a matter of privilege a report in an election case. (Footnote.)

At this point in the proceedings action by the House intervened. On February 14¹ Mr. Campbell reported from the Committee on Elections this resolution:

Resolved, That the Committee of Elections be authorized to have such papers printed, under its direction, as may be thought necessary to facilitate its investigations into the subjects referred to its consideration.

¹Journal of House, p. 409.

Mr. Cave Johnson, of Tennessee, proposed an amendment so that the resolution should read as follows:

Resolved, That the Committee of Elections be authorized to report to this House such papers and such other proceedings as they may desire to have printed by order of the House; and that they be instructed also to report forthwith which five of the ten individuals claiming seats from the State of New Jersey receiving the greatest number of [lawful] votes from the whole State for Representatives in Congress of the United States at the election of 1838 in said State, with all the evidence of that fact in their possession: *Provided*, That nothing herein contained shall be so construed as to prevent or delay the action of said committee in taking testimony and deciding the said case upon the merits of the election.

On February 28,¹ after long consideration, the word “[lawful]” was inserted on motion of Mr. Fillmore by a vote of yeas 97, nays 96, and then the resolution as amended was agreed to, yeas 103, nays 90.

These instructions, when received in the Committee on Elections, were a subject of disagreement. The majority of the committee in their report say:²

When the proposition to instruct was originally introduced as an amendment to the application with which the committee had come before the House, its intent was clear that a report should be immediately made of the names of those who had received the greatest number of votes at the late Congressional election in New Jersey. If anything more was wanting to explain the meaning of this proposition, it is to be found in the proviso which was added, and which clearly indicated that the action which the House was moved to demand did not contemplate an interference with the course adopted by the committee for the “taking of testimony and deciding the case upon the merits of the election.”

Under these circumstances, if the proposition to strike out the word “forthwith” and insert the word “lawful” had fully succeeded there would still have remained that prominent clause of proviso, and it might well have been understood that, notwithstanding the omission of the word “forthwith,” the House desired an immediate report, and that, notwithstanding the insertion of the word “lawful,” the House contemplated that the report should be independent of testimony now in the process of being obtained for the purpose of deciding the election upon its merits.

Upon what basis, then, could such a report be constructed? Manifestly not upon the partial, inconclusive, and incompetent testimony as to the legality of votes now in the possession of the committee. The House can not have contemplated a report involving an investigation of the ballot boxes without allowing time or opportunity for that investigation to be thorough.

The majority finally conclude that the House meant that a report be made on “the *prima facie* case upon the returns of the local officers of the several polls.”

The minority contended that the insertion of the word “lawful” had so modified the resolution that the committee would be justified in reporting as to the final right, the word “forthwith” meaning only that it should be done without unnecessary delay.

The minority also contended that before reporting certain testimony described in the following proposition should be examined:

That inasmuch as the depositions offered to this committee to prove that the poll of South Amboy was not held in conformity to law were rejected by this committee on account of a defect of notice in taking said depositions; and Mr. Smith, a member of this committee, has this morning presented a sealed package, directed to the Speaker of the House of Representatives of the United States, to the care of the Hon. J. Campbell, chairman of the committee, purporting to be depositions taken in the case of the New Jersey election, under a resolution of this committee postponing the examination into the ultimate right of the claimants until the second Monday in April next; and which the said Mr. Smith asserts, on the authority of a letter received from Mr. Halsted, relates to the manner of conducting the election at South Amboy, and the validity of the poll there holden: Therefore,

¹Journal, pp. 465, 469.

²Report, No. 506, p. 256.

Ordered, That the said sealed package be sent forthwith to the Speaker, to the end that it may be opened; and that this committee will proceed to examine said new depositions and to determine whether said poll was held in conformity with law.

But the committee declined by a vote of 5 to 2 to agree to the order.

The majority of the committee say that on the inconclusive testimony in their possession it would be unsatisfactory and unjust to look beyond the face of the poll, and continue:

It is proper, however, to state that should all the votes proved to be illegal by competent testimony be deducted from those who received the greatest number at the polls which appear to have been held in conformity with law the result would not affect the right of any candidate to a seat.

With this explanation, which they have considered due to the House and to themselves, the committee will now proceed to examine the allegations against the validity of certain township elections, as far as such an examination can be made upon the testimony in their possession.

Upon this branch of the case the claimants holding the governor's commissions claim—

First. That, apart from their not being received in time to be counted according to law, the votes of Millville should be set aside for the fraudulent and illegal conduct of the officers of elections, in proclaiming their intention to receive the votes of aliens, and in receiving a large number of such knowingly and in violation of the laws of the State.

Without inquiring into the effect of these charges, if they were substantiated by competent and satisfactory testimony, it is sufficient to state that they are unsupported by any testimony in the possession of the committee.

Second. They allege that, apart from all defects and irregularities in the return, the votes of South Amboy should be set aside, because one of the officers of election, duly chosen, was unlawfully prevented from acting, and another substituted in his place, who acted, and signed the list, etc.; and because the board, thus unlawfully constituted, received a large number of alien votes, contrary to law.

In support of these allegations numerous depositions have been produced, but without expressing an opinion whether, if satisfactorily proved, they would constitute sufficient evidence of fraud to set aside the votes of this township, it is only necessary to state that the evidence was taken ex parte, without sufficient notice, and has been rejected by the committee as incompetent to be considered in this case. (See Doc. E.)

Third. It is further claimed that the poll held at Saddle River, in Bergen County, should be set aside: Because at least eight votes given for them were fraudulently abstracted from the ballot box, and as many for their opponents fraudulently substituted;

Because, in making out the list of votes in said township, at least eight votes less than were given for them were counted in their favor, and at least as many were counted for their opponents more than they received; and,

Because the list of votes in said township bears upon its face evidence of mistake or fraud.

In support of these charges the depositions of numerous voters have been submitted; but being taken ex parte, and without sufficient notice, they have been rejected by the committee as incompetent testimony. (See Document F.)

It is also claimed that the polls held at the townships of Newton, Hardenton, and Vernon, in Sussex County, should be set aside, for reasons that will more fully appear by reference to the document marked "A," accompanying this report; but there is no competent evidence before the committee in support of these allegations.

The majority of the committee then proceeded to ascertain the result on the face of the polls, adding the votes of Millville and South Amboy to the returns on which the governor's certificates had been issued, and found:

Thus it appears that, *prima facie*, upon the evidence in the possession of the committee, Philemon Dickerson, Peter D. Vroom, Daniel B. Ryall, William R. Cooper, and Joseph Kille are the "five of the ten individuals claiming seats from the State of New Jersey" [who] "received the greatest number of lawful votes from the whole State, for Representatives in the Congress of the United States, at the election of 1838, in said State."

The minority of the committee say:

The majority, without considering the proofs admitted to be competent, the tendency of which was to show that unlawful votes had been polled for noncommissioned claimants, settled "forthwith" the principles upon which the report should be made, and peremptorily instructed the chairman to add the votes of Millville and South Amboy to those counted by the governor in privy council, thus resolving the duties of the committee into the solution of an arithmetical problem of the most simple character.

But there is an additional and most imposing fact which we desire to present for the consideration of the House before they decide this important question.

At the moment the committee had the report under consideration, and before any vote was taken thereon, the chairman had in possession a sealed package of depositions, addressed to the Speaker of the House, to the care of the chairman, and indorsed "depositions in the New Jersey case," forwarded by the commissioned claimants, and which the majority of the committee refused to send to the Speaker, to the end that the same might be opened and taken into consideration in the decision of the question then pending in committee. On examination we find that the said depositions establish and prove illegal votes cast for the noncommissioned claimants, which added to other unlawful votes already proven are sufficient to give one of the commissioned claimants [Mr. Stratton] his seat, on the ground of receiving a majority of lawful votes cast at the polls.

The following table will show how many illegal votes the commissioned Members must prove (if the votes of Millville and South Amboy be added) to establish their right over their opponents to the vacant seats, viz:

Mr. Stratton over Mr. Kille	31
Mr. Maxwell over Mr. Ryall	59
Mr. Halsted over Mr. Dickerson	117
Mr. York over Mr. Cooper	135
Mr. Aycrigg over Mr. Vroom	199

The proofs laid in the first instance before the committee would have established both Messrs. Stratton and Maxwell in their seats had the same been in all respects competent.

The injustice of refusing to examine the new depositions is the more apparent from the facts that they were taken as substitutes for other depositions on the same subject, which had been rejected under circumstances hereinbefore detailed. Their weight and effect are greatly enhanced by the fact that the contesting party was present and cross-examined the witnesses.

Therefore the minority recommended that the report be recommitted.

On March 5¹ Mr. Campbell submitted the report of the committee.² On March 10³ the House, by a vote of yeas 111, nays 82, agreed to a resolution declaring that the five claimants recommended by the majority of the Committee on Elections are entitled to take their seats in the House of Representatives, as Members of the Twenty-sixth Congress; and that the Speaker of the House, on their presenting themselves, qualify them as such: *Provided*, That nothing herein contained shall prevent the investigation into said election from being continued in the manner heretofore authorized by a majority of the Committee on Elections on the application of the five claimants of said State.

At various times thereafter the gentlemen thus seated appeared and took their seats.

795. The "Broad seal case," continued.

An early instance where partisan bias was charged against the Elections Committee.

Instance wherein, in the decision of an election case, each vote was treated as a distinct controversy.

¹ House Journal, p. 520; Report, No. 506: Journal, p. 1284.

² Journal, pp. 569-578; Globe, p. 256.

³ House Report No. 541, pp. 693, 733.

In the “Broad seal case” the Elections Committee delegated the arrangement of testimony to the parties.

Where poll lists were not preserved as a record parol proof was resorted to for showing that the vote was actually cast.

Hearsay evidence rejected in an inquiry as to whether votes were actually cast at the polls.

The Committee on Elections continued the investigation, and on July 16, 1840,¹ Mr. Campbell submitted the report of the majority of the committee on the question of final right, and at the same time Mr. Smith presented the minority views, signed by himself and Messrs. Fillmore, Botts, and Randall. The minority views especially show much partisan feeling, especially in the portion where it is declared that “the conclusions and judgment of the majority of the committee are wholly unworthy of the sanction of this House, and of the confidence of the country.”² The investigation of the committee related to nearly 600 distinct cases of votes alleged either to have been cast unlawfully or to have been refused unlawfully. The most minute and tedious course was adopted, the case of each individual vote being treated as a distinct controversy, testimony being admitted and arguments made as to it. The question was then put upon a formal resolution, devised with reference to the *prima facie* legality of the proceeding at the polls and the burden of proof.

The report says, as to the sifting of evidence:

In the hope that the grounds of the controversy might be more strictly defined and narrowed, and that the testimony scattered through so many separate depositions, bearing on the same points, might be so arranged and collected as to facilitate the labors of the committee, while it should insure the ends of justice, the testimony in the possession of the committee was, on the 16th day of April, by the mutual arrangement of the parties, delivered into their hands, and the committee continued the investigation of other cases pending before them.

Although, from this arrangement, much greater delay ensued than the committee anticipated, the subsequent investigation proved that, without the assistance of the parties, the difficulties of the investigation would have been almost insurmountable; testimony in relation to the same vote being often found to have been taken not only from many different witnesses, but at various and distant times and places, to which no clew would else have been furnished.

Nevertheless, impatient of delay, the committee passed resolutions calling on the parties on the 13th and 20th of May, and, finally, on the 2d of June.

The committee having previously, under the power granted by the House, ordered the papers to be printed, the final investigation was commenced on the 3d of June, with a volume of evidence of nearly 700 printed pages.

The majority further say as to the rule adopted for arriving at a decision:

As applied to alleged unlawful votes, it presents two affirmative propositions: First, that the vote in question was not a lawful vote; and, second, that it be deducted from the votes of one or the other of the parties. The first proposition involved the inquiry whether the vote was actually cast at the polls; and, for the ascertainment of this point, the committee necessarily resorted to parol proof, as the best evidence which the nature of the case would admit of; the laws of New Jersey not requiring the poll lists to be preserved as a record of the actual voters. Mere hearsay declarations of the alleged voter, as to the fact of his having voted, have been uniformly rejected.

¹ Mr. Campbell claimed the right to make this report as a matter of privilege. Mr. Speaker Hunter ruled against this contention; but on appeal the House overruled the decision, yeas 124, nays 39. So the report was made as a matter of privilege. (Journal, pp. 1281, 1284.)

² See also Section 785 for a similar charge.

796. The "Broad seal case," continued.

An admitted ballot is prima facie good, and the burden of proof is on the party objecting that the voter is an alien.

A vote being received as sound, the mere fact that the voter is alien born does not compel the party claiming it to prove naturalization.

Distinction between a controversy at the polls as to a vote and a controversy before the Elections Committee where the voter is not a party.

In a controversy as to votes objected to because the voter is an alien, the party attacking the qualification may be required to prove a negative.

The inquiry naturally divided itself into several branches:

1. The lawfulness of the votes, with respect to the qualifications of the persons casting them or claiming the right to cast them, involving inquiries as to—

(a) The nature of the proof as to aliens.

The majority say on this point:

A minority of the committee were of opinion that it was sufficient for the party objecting to the vote to prove that the voter was alien born; and that the burden of proof was thereby thrown upon the party for whom the vote had been rendered at the poll, to prove that the voter had been naturalized. And it was urged, with great earnestness, that, to adopt any other rule of evidence would be to depart from the plainest principles of law and reason—to impose upon the party objecting to a vote the proof of a negative; and a negative, too, which nothing short of searching of every court of record having common-law jurisdiction, a clerk, and seal, in the Union, could possibly establish.

Without minutely criticising the argument, it is deemed proper to inquire to what practical consequences the rule would lead, if it be fully admitted; for the proposition is to be taken, not as a mere abstract annunciation of the order of proof, but as practically applicable to the decision of cases of contested election in the House of Representatives.

The committee, as the organ of the House, have a positive affirmative proposition to adjudge and declare, before a sitting Member can be displaced, or a single vote received for him at the polls can be ejected from the ballot box. Before a Member is admitted to a seat in the House, something like the judgment of a court of competent jurisdiction has been pronounced upon the right of each voter whose vote has been received; and in order to overturn this judgment, it must be ascertained affirmatively that the judgment was erroneous. *Prima facie*, it is to be taken that none but the votes of qualified voters have been received by officers whose sworn duty it was to reject all others. This principle will be found to have been solemnly and unanimously declared by the committee as a basis of future action, soon after entering upon the investigation of this case. (See Report No. 506, p. 46.)

It is not sufficient that there should exist a doubt as to whether the vote is lawful or not; but conviction of its illegality should be reached, to the exclusion of all reasonable doubt, before the committee are authorized to deduct it from the party for whom it was received at the polls.

Will the mere naked fact that a voter was alien born, in the absence of all other proof, produce such conviction on any candid mind? Is it not already answered, or, rather, is not even a presumption from that fact alone precluded, by the judgment at the polls? All foreigners from birth are not disqualified from voting, but only a certain class. Are we to presume that the voter, whose vote has been received by the officers of the election, to be of the disqualified or the qualified class? The question is answered by the unanimous resolution of the committee already referred to, as well as by the reason and analogy of the case.

The committee can not believe that the House of Representatives would eject a Member from his seat upon the mere proof that every man of his constituents was alien born. It is not apprehended that, after an election has been regularly held, the House would even consider an investigation necessary upon a petition which alleged no other fact.

The report continues:

But it may be asked, Does not the presumption originally arising from the fact of foreign birth acquire additional strength, and may it not overturn the decision at the polls, when neither the voter

nor the party claiming the benefit of his vote before the committee adduces here any evidence of his naturalization? If the voter refuses to testify to his own disqualification (as he legally may) how can the party impeaching his vote proceed further in the proof of his allegation? Shall he be put to the proof of a negative? Is not the voter a party to the proceeding, and is not his neglect to rebut the proof of his birth by the evidence of his naturalization conclusive against him?

Undoubtedly if the voter be, to all intents and purposes, a party to this proceeding, claiming to exercise a right here, such would be the conclusion; and, unless he should make out his right affirmatively, he must fail to establish it. So it was at the election; and so it would be here, if the committee were holding a poll. But such is not the vocation of the committee or the House. If it were, the mere reference of the petition, the mere creation of a controversy, would annul all that has been done at the election. Then, indeed, things would be taken up and treated *de novo*; voters who had once maintained their right and exercised it at the polls would be required to come forward and submit themselves to another challenge, and a new affirmation of their franchise.

Again, if the voter is, to all intents and purposes, a party to the proceeding before the House or its committee, how is it that he is admitted to testify as a witness? Why are not all his declarations or admissions, wheresoever and howsoever made, in relation to the subject-matter of the controversy, the best evidence when proved by a competent witness? The distinction between the controversy at the polls and that before the committee is manifest. At the polls the voter is a party. When the polls are closed and an election is made the right of the party elected is complete. He is entitled to the returns; and when he is admitted to his seat, there is no known principle by which he can be ejected, except upon the affirmative proof of a defect in his title. Whoever seeks to oust him must accomplish it by proving a case. The difficulties in his path can form no possible reason why the committee should meet him halfway. The rule of reason requires that he should fully make out his case, even though it involve the proof of a negative; and such is also the rule of Parliament in analogous cases. (See 3d Douglas, 219.)

In Rogers's *Law and Practice of Election Committees*, page 116, it is said: "So in cases of petitions against candidates on the ground of want of sufficient qualification—although a negative is to be proved, it is the usage of Parliament that the party attacking the qualification is bound to disprove it."

It may be added that this rule has been applied by the committee, without controversy, to every other species of alleged disqualification. In the cases of aliens alone was a different rule contended for. Adhering to the rule, the committee have uniformly required something more than the mere affirmative proof of foreign birth; the disqualification not being foreign birth, but the actual state of alienage at the time of voting.

The great number of cases in which the disqualification has been fully made out, and the votes deducted from the one party or the other, sufficiently answer the objection which has been supposed to arise from the alleged impossibility of proving the negative. In none of these instances were the parties put to the necessity of searching every "court of record having common-law jurisdiction, and a clerk, and seal, in the Union." In some cases the voters themselves have declared, under oath, that they were never naturalized; in others, while asserting their naturalization, they have stated circumstances inconsistent with it. In short, an infinite variety of circumstances, which will be found in the evidence, joined with the fact of foreign birth, have completely proven the disqualification in a great number of cases.

On the other hand, the hardship of requiring the sitting Member, upon the mere proof of foreign birth, to produce before the committee evidence of the naturalization of hundreds or thousands of persons over whom he has no control, and who, by withholding that proof, may vacate his election, must readily be admitted. The proper season to demand such proof is at the polls. There the voter is the actor; he comes forward claiming to exercise a right, and there he should prove his qualification. Where the case assumes the form of a contested election between other parties, the disqualification must be made out by the party seeking to overthrow the right of the sitting Member thus acquired at the polls.

The minority in their views discuss this question thus:

To enable the House to appreciate the action of the committee on the cases to which we are about to refer, we would remark that it was conceded by all the Members that the reception of a vote by the election officers raised a presumption in favor of the legality of such vote. Early in our deliberations we adopted a resolution declaratory of this principle, the justice and propriety of which must be

apparent to all, but very soon after we commenced scrutinizing the votes we perceived that there was a radical difference of opinion in the committee touching the use which should be made of this presumption.

The undersigned are persuaded that the only effect which can be given to the reception of a vote at the polls is to throw the burden of proof on the party objecting to its legality. But the majority seemed disposed to carry the principle much further and to convert the presumption into a "swift witness" in favor of the opposite party. If a credible witness was adduced, who proved the fact of illegality by his positive oath, the majority would confront such witness with the presumption and would give it all the efficacy appertaining to testimony under oath; and thus, balancing the oath of the living witness against the presumption, they would come to the conclusion that nothing was proved. Nay, more. The majority, strange as it may seem, held that the presumption was so strong that it imposed on the party excepting to a vote the burden of proving a negative. When Messrs. Aycrigg and others objected to a vote on the ground of alienage, they were required to prove, not merely that the voter was an alien born, but that he had not been naturalized—a task which, in many cases, is wholly impracticable.

The undersigned can not omit noticing one curious circumstance, and that is, that this presumption seldom visited the committee room except when one of these parties was endeavoring to establish the illegality of votes.

If it appeared at all when the other party was making the same effort, the undersigned must say they were scarcely conscious of its presence.

* * * * *

Any general rule, the effect of which, though administered with impartiality, should be to increase the embarrassment would obviously operate in their favor; and we ask what rule could be better adapted to the end suggested than that of giving an inordinate effect to the reception of a disputed vote at the polls? This idea was a prolific source of difficulty to the committee, and, what is of more consequence, of flagrant injustice to one of the parties. One of the many progeny of this suggestion was the legal absurdity that the party objecting on the ground of alienage must, under all circumstances, prove not only that the voter was an alien born, but, in addition, that he never had been naturalized. The committee knew at the outset that Messrs. Aycrigg and others expected to prove many alien votes to establish their right to the seats. This was set forth fully in the exposition of facts which they submitted to the committee at an early stage of the proceedings. The House can not fail to observe how admirably the rule of negative proof is fitted to embarrass one side of this controversy and to fortify the position of the other side, but, nevertheless, it is the duty of the party thus embarrassed to submit to the evil if the rule itself be founded in law. But we insist that it is not so founded. No precedent can be found of the application of such a rule to such a case. The party having the affirmative of the issue takes the burden of proof. A foreigner comes to the polls and votes. You can prove that he is such, but how can you prove that he has not been naturalized? Perhaps he may be willing to testify, and then you may prove the fact by his own oath. But suppose he is dead, or has removed away, or chooses to stand mute. He can not be put to the question, He can not be compelled to criminate himself. The rule imposes on the party objecting the necessity of searching all the records in the Union and of getting the testimony of every record keeper to prove the fact. This is manifestly impossible. No man in his senses can believe that any such rule exists. It is a principle of the law of evidence "that the affirmative of the issue must be proved; and he who makes an assertion is the person who is expected to support it before he calls on his opponent for an answer." And again: "The burden of proof lies on the person who has to support his case by proving a fact of which he is believed to be cognizant." (Vide Rogers's Law and Practice of Elections, p. 114–117.)

To suppose any member of the committee to be ignorant of a rule of law so old and universal and founded in so much good sense would be to justify his integrity and maintain his impartiality at the expense of his judgment and of every qualification required for the proper discharge of the duties of a committee on elections. We disclaim all design of charging the course adopted by the majority to corrupt intentions, but we very reluctant to embrace the other branch of the alternative; and conclude, therefore, that some strange prejudice must have taken possession of the mind and led the judgment captive at will.

But not only did the committee adopt a very extraordinary rule, but they applied it to the case in a very extraordinary manner, and they essentially aggravated the evil which that rule was adapted

to inflict, for they held votes to be lawful on account of the absence of proof of nonnaturalization in cases where—

(1) The election officers decided that aliens had a right to vote according to law and avowedly admitted them to vote on that ground.

(2) Where aliens were summoned before the magistrates who took the evidence and where they refused to attend, or, if they attended, stood mute as to their right.

(3) Where the two circumstances above indicated were combined, as they were in many of the cases submitted to the committee.

(4) Where aliens produced at the polls, as evidence of naturalization, a declaration of an intent to become naturalized at a future period, which we all know is a mere preliminary step to, but is not, naturalization itself.

In many cases the committee held votes to be lawful where all the above circumstances were united against the voter.

797. The “Broad seal case,” continued.

Although the State law did not disqualify a person non compos mentis as a voter, the Elections Committee examined.

(b) As to nonresidents.

The report cites the law of New Jersey and states that in settling the various questions they endeavored “to apply the well-settled principles of law.”

(c) As to persons non compos mentis.

The report says:

Persons non compos mentis are not expressly disqualified by the terms of the law; but the committee entertained the allegation in a single instance from the general reason and nature of the case. Questions of sanity, however, being of the most delicate and difficult which arise in the courts, the committee could not consent to disqualify a voter on this ground except upon the most distinct and indubitable proof, and none such being adduced, his vote was not disturbed.

798. The “Broad seal case,” continued.

Where a State law made payment of tax evidence of property qualifications, the House did not count the ballot of a voter whose tax another paid.

(d) As to the qualifications of voters as taxpayers.

The fundamental law of New Jersey required the voter to be “worth \$50 proclamation money, clear estate, within the colony.” And by statute it was further provided that—

SEC. 5. Every person who shall, in other respects, be entitled to a vote, and who shall have paid a tax for the use of the county or the State, and whose name shall be enrolled on any duplicate list of the last State or county tax, shall be adjudged by the officers conducting the election to be worth \$50, money aforesaid, clear estate.

SEC. 6. That no person shall hereafter be deemed, by the officers conducting the election, to be a qualified voter, who has not either paid a tax, or whose name is not enrolled on the duplicate, as aforesaid, except in case of persons removing from one township, wherein they have paid a tax, to another township in the same county, or of persons who have been inadvertently overlooked by the assessor; in either of which cases, such persons claiming a vote, and being in other respects qualified, shall be admitted; and in the case of persons who have been inadvertently overlooked by the assessor, as aforesaid, their names shall be immediately entered on the tax list.

The report continues:

Without attempting, in this place, to criticise minutely the respective provisions of these laws, it may be sufficient to state, that they seem at least to confine the right of suffrage, in all cases, to bona fide taxable citizens, in other respects duly qualified. When, therefore, it has appeared that previous to, and at the time of voting, the voter has received support from the town as a pauper, and has not paid a

tax, the committee have not considered him a "qualified voter in respect of estate." So, also, where a person of that class was brought to the polls, and a tax there paid for him by another, on condition that he should vote a certain ticket, the committee did not consider the former a bona fide taxpayer, and his vote was deducted.

The minority say:

The undersigned have felt much embarrassment in giving a construction to these sections, and they can not but feel much surprised that the good people of New Jersey should have suffered the invaluable right of suffrage to be involved in all the perplexity and doubt of absurd and contradictory phraseology; but, on full consideration, they are disposed to give these sections a construction conforming to what they understand to be the practice of the State; and to hold that, if a person has either paid a tax, or has had his name enrolled on any duplicate list of the last State or county tax, he is entitled to the elective franchise, as he is also in the excepted cases specified in the last section.

It is usual, in New Jersey, for a person whose name has not been enrolled, and who desires to exercise the elective franchise, to appear at the polls and to demand the enrollment of his name; which is always done, under the idea that it has been "inadvertently overlooked" by the assessor; and thus (by the payment of a trifling tax) the elective franchise is put within the reach of every citizen of New Jersey. But it would obviously be improper to enroll a pauper; it can not be supposed that the name of such a person was "inadvertently overlooked," and it would be absurd to call on a man to pay taxes who can not do so; and, if he could, to whom the money would be forthwith returned for his support. Hence, we deem it settled that paupers can not vote in New Jersey. This brief exposition of the laws of that State will enable us to contrast some of the cases under this head; and the House can judge whether the committee were any more successful in administering "equal and exact justice" to the parties in this than they were in the other branches of this inquiry.

799. The "Broad seal case," continued.

The voter not being compelled to testify for whom he voted, proof of general reputation as to political character and party preferences was accepted to determine the vote.

Votes improperly rejected were, in absence of direct testimony, counted on proof of the general political action of the voter.

2. The deduction of unlawful votes from the poll, and the determination as to votes improperly rejected.

The majority say:

It being satisfactorily ascertained that an unlawful vote was counted at that election, the next inquiry which arose was as to the party for whom it was cast at the polls.

The elections in New Jersey are by ballot; and it will readily be perceived that this inquiry was not without serious difficulties.

Although, in numerous instances, the voter, being examined as a witness, voluntarily disclosed the character of his vote, yet, in many cases, he either did not appear, or, appearing, chose to avail himself of his legal right to refuse an answer on that point. In such cases the proof of general reputation as to the political character of the voter, and as to the party to which he belonged at the time of the election, has been considered sufficiently demonstrative of the complexion of his vote. Where no such proof was adduced on either side, proof of the declarations of the voter has been received; the date and all the circumstances of such declarations being considered as connecting themselves with the questions of credibility and sufficiency. In every instance where the proof, under all the circumstances, was not sufficient to produce conviction, the vote has been left unappropriated.

The same principles have governed the committee in regard to the votes decided to have been improperly rejected at the polls.

The undersigned would observe, that, early in the investigation, a question arose as to the character of the proof which should be received and deemed sufficient to enable them to appropriate such of the votes as they might determine to have been unlawful. In New Jersey the vote by ballot obtains, as in most of the States of the Union. If an unlawful vote be cast, how are we to ascertain who had the

benefit of such vote? It is obvious that in many cases it will be impracticable to obtain positive proof. In some cases, the voter may be willing to appear and disclose the fact under oath; in other cases, it may be in the power of the party to produce a witness who can swear to the character of the vote given; but in many more, no evidence of that description can be obtained to ascertain the fact in controversy. It seems to the undersigned to be indispensable to receive secondary evidence to this point, such as the declaration of the voter, either at the election or soon after; and also proof of his political character, which, when well defined, will be a sufficient guide to the truth. But we ought to be very careful not to receive and act upon evidence of an equivocal character, which may have been created or manufactured for the occasions. In adopting these views, there was a good degree of unanimity in the committee; but the majority have been by no means consistent in carrying them out.

800. The "Broad seal case," continued.

The charge that an election officer was not legally chosen not being fully established, the committee declined to reject the poll.

Failure to transmit to a county clerk certificate of the choice of an election officer is not a reason for rejecting the poll.

3. As to the conduct, qualifications, and competency of election officers.

(a) The majority say:

It only remains to notice the objections made to the validity of the election at South Amboy, and the allegation of fraudulent practices by the officers of the election at Saddle River.

The objections to the election in those two townships will be considered in the order in which they are named.

For himself and associates, "Mr. Halsted objects to the election held in the township of South Amboy, in the county of Middlesex, because the said election was held by judges who were not chosen according to law.

"And because John B. Appelget, who had been duly chosen inspector of said election, according to law, to supply the place of Clarkson Brown, who was disqualified, was not permitted to act as inspector at said election in said township.

"And because James M. Warne acted as inspector of said election in said township, without having been duly elected inspector according to law.

"And because there was no certificate of the election of the said James M. Warne, inspector, signed by three reputable freeholders, transmitted to the clerk of the common pleas of the county of Middlesex within the time prescribed by law.

"And because the judge of the election in said township of South Amboy knowingly received illegal votes.

"And because the said judges of said election did not conduct the said election in said township according to law."

After having heard and considered the testimony in support of the above allegations, the committee unanimously resolved "that there did not appear any sufficient reason for setting aside the election in South Amboy."

In New Jersey the election is conducted in each township by a judge, and the assessor and collector of the township, who are ex officio inspectors of election; and the law prescribes that "if the judge, assessor, and collector, or either of them, shall not be present at the time and place of holding the election, or shall be disqualified to hold the same, then, at the hour of 10 o'clock, the people present entitled to vote shall proceed to choose a person or persons to serve in the place of him or them so absent or disqualified."

One inspector at South Amboy being disqualified, three persons were placed in nomination for the vacancy. As to whether or not James M. Warne, one of these, was elected substantially in conformity with law, there was a conflict of testimony. After weighing the evidence the majority conclude that the contestants failed to establish their allegations that the South Amboy election "was held by officers not chosen according to law."

The minority say as to this point:

In the township of South Amboy, a whig inspector was duly elected by the majority of the people present at the time prescribed bylaw, but was not permitted to act. The moderator of the town meeting, after such choice, took it upon himself to proclaim a new election; and he kept the same open until a sufficient number of his political friends were assembled to secure the election of the administration candidate. This of itself would seem to us to be sufficient to render the election, so far as this township is concerned, irregular and void.

(b) The majority further say:

The third allegation, to wit: "That there was no certificate of the election of James M. Warne, inspector, signed by three reputable freeholders, transmitted to the clerk of the common pleas of the county of Middlesex within the time prescribed by law," although proved, is believed by the committee to be entirely inadequate to affect the validity of an election legally held. Surely, it can not be that one of the dearest rights of Jerseymen—a right which, more than any other, distinguishes the citizen of a representative Government from the subject of a despot—is to be trampled in the dust, because, forsooth, there was no certificate of the election of James M. Warne, inspector, signed by three reputable freeholders, transmitted to the clerk of common pleas of the county of Middlesex within three days thereafter! Whatever pretext such an omission may have afforded to the clerk of the county of Middlesex for the perpetration of a daring outrage upon the rights of his fellow-citizens, in suppressing the votes polled at South Amboy, in the return transmitted by him to the governor, it can not affect the legality of the election. It was not necessary that a certificate of the election of the inspector should have been transmitted to the clerk of common pleas, either before or during the election; and the omission to do so afterwards, can not have a retrospective effect to defeat the will of the people, expressed in conformity with law. The disqualification of an officer, to affect the legality of an election, must evidently be coexistent with the election.

801. The "Broad seal case," continued.

An election being honestly conducted, the reception of illegal votes does not vitiate the poll.

No fraud being shown, a poll is not rejected because the ballot box does not contain as many votes as are proved by oath of voters.

(c) The majority further say:

The fourth and fifth allegations are, in substance, that the judges of the election knowingly received illegal votes, and did not conduct the election according to law.

Illegal votes were proved before the committee to have been received for both parties at South Amboy, of which the poll has been purged by the committee; but, so far as intention was concerned, it appears, by the evidence, that the election was fairly, honestly, and legally conducted; and the proof is insufficient to establish the fact that a single illegal vote was knowingly received.

(d) The majority further say:

Mr. Halsted and associates also claim to set aside the poll held at the township of Saddle River, in the county of Bergen, because eight votes, at least, given for them by persons legally entitled to vote, were fraudulently abstracted from the ballot box, and at least as many for their opponents substituted in their place; because, in making out the list of votes in said township, at least eight votes less than were actually given for them were counted in their favor, and at least as many were counted for their opponents more than they actually received; and because the list of votes of said township shows upon its face evidence of mistake or fraud.

In support of these allegations the depositions of 31 voters are produced, each one of whom swears that he voted the Whig ticket; and, by the deposition of the clerk of the election, it appears that one other, who was not sworn in person, voted the same ticket—making, in all, 32 votes. (See testimony accompanying this report, from page 424 to 446, inclusive.)

They also show that the officers of the election at Saddle River returned but 24 votes for them, leaving 8 votes to be accounted for; and that 127 votes, in all, were returned, when it appears that there should have been but 126.

On the part of Messrs. Vroom and his associates it was contended that the election was fairly and legally conducted, and that the ballot box was so secured that its violation was impossible. They also offered explanations to cover nearly the whole discrepancy. The majority of the committee say that they—

are so well convinced, from the evidence, that the election was fairly and legally conducted, and that no fraud was perpetrated on the ballot box, that they have determined to take the return of the officers of election as the best evidence produced, and to sustain the legality of the Saddle River poll.

The minority say as to this poll:

It appears, from proof which we deem quite satisfactory, that 32 votes were deposited in the ballot box at Saddle River for the opposition candidates; the voters themselves swear to it in positive terms; and yet, from some cause, when the votes came to be counted off, the number appeared to be only 24. We do not intend to cast an imputation upon the inspectors of the election; they are, doubtless, respectable men; but the House can hardly fail to be impressed with the fact, that evidence is adduced as to the good character of the inspectors, but none at all as to that of the clerk; and as he had charge of the ballot box, he can, doubtless, explain the rule of reduction which seems to have operated so mysteriously in Saddle River Township.

802. The “Broad seal case,” continued.

Discussion as to duties of returning officers with reference to technical requirements of law.

4. As to the conduct of certain returning officers.

The majority in their report say:

The committee do not think it necessary to comment upon the extraordinary transactions which occurred in New Jersey shortly after the closing of the polls, and from which, it is believed, all the difficulties of this case originated, further than to say that in suppressing the votes of Millville and South Amboy, the clerks of Middlesex and Cumberland were guilty of a gross violation of the elective franchise, calculated virtually to deprive the people of one of their dearest rights, and to keep from this House a knowledge of those facts by which alone it can judge of the election of its Members. The duties of those clerks, as returning officers, were strictly ministerial; and when, instead of making a faithful record of the people's will, as expressed at the polls, and transmitting those records to the governor, or person administering the laws of the State, they undertook to decide upon the legality of the polls, and to act in accordance with those decisions, they exercised an unauthorized power, which, for more than three months, silenced the voices of five out of the six Members to which New Jersey was entitled in the House of Representatives; and for which their conduct, whether proceeding from ignorance or design, must meet with the unqualified disapprobation of the honest and intelligent of every party.

The minority say:

Much censure has been cast upon the clerks of Cumberland and Middlesex, because the return of votes from the townships of Millville and South Amboy were not included in their general lists forwarded to the governor. With how little justice, the following facts will show. The Millville return was made to the clerk on the 13th of October, “between the hours of 10 and 11 in the afternoon;” and as the law of New Jersey is positive that the return shall be made to the clerk “before 5 o'clock of that day,” and he is then, at 5 o'clock, to make his “general list,” to be transmitted to the governor, of course he could include in that general list no returns except such as were received “before 5 o'clock.” The clerk had no discretion; he proceeded according to law, and is in no way censurable; the blame, if any, belongs to the election officers.

The return from South Amboy was made by a judge and inspector, and by James M. Warn, representing, himself as an inspector; his name, however, as such, does not appear in the list of town officers, nor was there any certificate or other evidence of his election as inspector filed with the clerk, as the law requires. If he had been duly elected to supply a vacancy (which we insist he was not), the law requires the certificate of such election to be filed with the clerk within three days. None such was ever filed. The certificate was presented to the clerk ten days after the election, and after the general list had been

made out and sent to the governor. Of course, as the return was not made according to law, the clerk could not receive it; especially in a case like South Amboy, where the election of this very inspector was disputed as illegal and fraudulent, and where he and those who acted with him decided to receive alien votes, and actually did receive a number of such. The evidence adduced to sustain the charge of fraud against the clerk of Middlesex very clearly disproves the whole charge; and his conduct, like that of the clerk of Cumberland, was strictly in accordance with the law, and in nowise censurable, unless the refusal to violate the law, in order to receive an illegal return, including a number of alien and illegal votes, be censurable.

The majority of the committee, as a result of their application of the enunciated principles, recommended the following resolution:

Resolved, That Peter D. Vroom, Philemon Dickerson, William R. Cooper, Daniel B. Ryall, and Joseph Kille are entitled to occupy, as Members of the House of Representatives, the five contested seats from the State of New Jersey.

The minority admitted the election of Messrs. Vroom and Cooper, but contended that the contestants were elected to the remaining three seats.

On July 16,¹ under the operation of the previous question, the resolution proposed by the majority was agreed to, yeas 102, nays 22. Many members declined to vote, apparently with the intention of breaking a quorum.

803. The Pennsylvania election case of Ingersoll v. Naylor, in the Twenty-sixth Congress.

Two claimants appearing with conflicting credentials at the time of organization, the Members-elect examined and determined which should vote.

Instance wherein citizens of a district, by memorial, participated in an election contest.

Before the enactment of a law, the Elections Committee, having power to compel testimony, delegated the duty of taking depositions.

Before the enactment of the law, the Elections Committee directed testimony to be sealed and transmitted to its chairman.

When the House met for organization on December 2, 1839, and the clerk of the last House began the call of the roll of Members-elect, which at that time was made up in pursuance of usage and not in accordance with law, a question arose when the State of New Jersey was reached. This question caused a prolonged controversy, during which the assembled Members-elect chose Mr. John Quincy Adams, a Member-elect from Massachusetts, chairman. As the proceedings went on it appeared that there were participating in the proceedings Messrs. Charles Naylor and Charles J. Ingersoll, claimants from the same district in Pennsylvania. Each had what purported to be credentials, and on December 10 and 11,² a question came as to which of the two should be allowed to participate. After examination of the credentials and law of Pennsylvania the assemblage decided that Mr. Naylor should be permitted to vote and that Mr. Ingersoll should not vote.

On December 17,³ when the House had finally elected a Speaker, the oath was administered to Mr. Naylor with the other Pennsylvania Members.

¹ Journal, p. 1297.

² First session Twenty-sixth Congress, Journal, pp. 11–14, 20; Globe, pp. 38–40.

³ Journal, p. 84.

On January 24, 1840,¹ Mr. George M. Keim, of Pennsylvania, presented the petition of Mr. Ingersoll setting forth that he was elected to Congress from the Third district of Pennsylvania; that Mr. Naylor was not elected, and praying an investigation. Mr. William S. Ramsay, of Pennsylvania, also presented a petition of citizens and electors of the said district complaining of fraud and illegality in the election of Charles Naylor, and praying for an investigation.

These petitions were referred to the Committee on Elections.

On February 24² the House, by resolution, authorized the Committee on Elections in this case "to send for persons and papers."

On February 26³ the Elections Committee, in accordance with the usage at that time, and in the absence of any law prescribing the manner of conducting election contests, adopted a resolution authorizing the parties to take testimony "before Boys Newcomb and William Grennell, esqs., commissioners," or such persons as they might appoint, providing for notice between the parties, etc., and also containing the following further provisions:

And that, if any witness or witnesses shall refuse to attend, upon a subpoena for that purpose being served upon him or them, by order of the commissioners or commissioner, or, attending, shall refuse to testify, the name or names of such witness or witnesses shall be reported forthwith to this committee, by the commissioners or commissioner, for such further proceeding as this committee shall direct.

And that all testimony taken by virtue of this resolution shall be certified, sealed up, and transmitted by the commissioners or commissioner to the chairman of this committee on or before the 3d day of April next.

804. The case of Ingersoll v. Naylor, continued.

Hearsay evidence is rejected in considering an election contest.

No illegal vote being shown, the poll was not rejected because of presumptions created by a census and arithmetical calculations.

An election may not be impeached by comparison with the result at another election in the same constituency.

In the absence of fraud or injustice irregular action by election officers does not vitiate the poll.

On July 17,⁴ Mr. Millard Fillmore, of New York, submitted the report of a majority of the committee, five of the nine Members concurring in it. Three members of the committee signed minority views, and one member of the committee did not act in the case and concurred neither in the report nor the views.

The majority reported a resolution confirming the title of Mr. Naylor to the seat, while the minority proposed that the seat be declared vacant.

Two questions were involved in the case.

1. Mr. Ingersoll alleged that in Spring Garden and in five wards of an incorporated district called the Northern Liberties there were frauds and irregularities, and that—

by a conspiracy among the election officers to carry the election by fraud many hundred names were illegally and fraudulently added to the registries of voters, being the names of persons having either no existence or no right to vote, whose votes or pretended votes were nevertheless counted and allowed to Mr. Naylor.

¹ Journal, p. 228.

² Journal, p. 429.

³ Report No. 588, p. 1.

⁴ Journal, p. 1300; Globe, p. 537; Report No. 588, pp. 545, 551.

The majority say that a large amount of hearsay evidence was brought in to sustain this allegation, but the committee rejected it, saying that—

The rule upon which the committee reject all this hearsay evidence they conceive too well settled and too clear and just to require any argument.

Mr. Naylor's majority was 775. The majority say:

No attempt was made by direct evidence to purge the polls; nor has the petitioner shown, or attempted to show, that a single illegal vote was received by the officers of election, or a single fictitious one allowed to the sitting Member. Though the addition of a large number of names to the register in one of the wards in Spring Garden, by the officers whose duty it was to prepare it, was a suspicious circumstance, requiring careful scrutiny, yet, as the error, if any, was corrected before the election commenced, and as there is no proof of any illegal vote having been given in that ward at that election, the committee do not see how this fact can possibly be invoked to affect the result.

The attempted political census, had it been otherwise competent, was clearly too vague and uncertain to lay the foundation for any judicial decision; all the material facts in it came under the general denomination of hearsay evidence, of the most loose and unsatisfactory kind; and besides when contrasted with the other authentic evidence it becomes utterly worthless.

The report also condemns "arithmetical calculations" founded on "uncertain and unsatisfactory bases" as unworthy of credit.

The report continues:

The petitioner also charges a number of small irregularities in conducting the election and counting the votes, consisting mainly in slight deviations from the strict requirements of the law. There is no proof that any injustice was done or fraud intended; and as there was manifestly a substantial compliance with the law the committee do not conceive that it could be for the advancement of substantial justice to entertain objections of this kind. Our election laws must necessarily be administered by men who are not familiar with the construction of statutes, and all that we have a right to expect are good faith in their acts and a substantial compliance with the requirements of the law.

The minority, taking the ground that the seat should be declared vacant because of the "imputed frauds and irregularities of the election of 1838," which had caused much excitement in the State of Pennsylvania, say:

At that election the majority returned for Mr. Naylor was 775 votes yet at the succeeding election of 1839 the majority against his party in the same district was about three times that number of votes, which extraordinary change is believed by the undersigned to be ascribable solely to an alteration of the law so as to prevent, in 1839, the frauds and irregularities which are supposed to have taken place in 1838.

The minority further contend that the irregularities on the part of the election officers were very great; that they permitted the count to be made and the returns to be drawn up by unauthorized persons, and that these irregularities were in pursuance of a conspiracy.

2. It was alleged that at Spring Garden the election officers were not sworn in order that they might carry the election of Mr. Naylor. It was alleged that a mock oath was taken, "either on a Philadelphia directory" or "The Narrative of the Sufferings of Some Shipwrecked Marines," to "do justice to their party this day." The majority of the committee, after an examination of the testimony, decided to give no credit to the charge.

The report was, when presented to the House, laid on the table.¹

¹Journal p. 1300.

On January 15, 1841,¹ after arguments by the contestant and sitting Member, the report of the majority of the committee was agreed to by the House, yeas 117, nays 85.

A proposition to secure certain evidence was proposed, but not admitted.

805. The Virginia election case of Smith v. Banks, in the Twenty-seventh Congress.

Instance wherein, pending decision on an election case, the sitting Member resigned for a new appeal to the people.

Instance wherein an election contest abated by resignation of sitting Member for a new appeal to the people.

Early instance wherein compensation was voted to a contestant.

On June 8, 1841,² Mr. Thomas W. Gilmer, of Virginia, presented the memorial of William Smith, claiming to be duly elected a Member of the House from the Thirteenth district of Virginia, instead of Ann Banks, who had been returned and was the sitting Member. This memorial was referred to the Committee on Elections. Thereafter at various times³ during the session testimony relating to this contest was presented and referred to the committee.

It appears indirectly from the Journal that about September 4,⁴ at the instance of the sitting Member, the decision of this case was postponed until the next session of Congress.

On December 8, 1841,⁵ at the next session, Mr. Smith appeared with credentials showing that he had been "elected to supply the vacancy occasioned by the resignation of Linn Banks." Mr. Smith was seated without objection.

On August 31⁶ Mr. Smith, in explaining a resolution to give to himself pay for the time he was a contestant, made a statement of the case, which was corroborated on the floor by the chairman of the Committee on Elections. Mr. Smith stated that at the first session he conducted his case before the Elections Committee until he overcame the sitting Member's majority. It was then, he said, upon the application of his competitor, and against his own earnest remonstrance, that the case was postponed. Then he and Mr. Banks agreed to refer the matter to the people. The people decided the case in Mr. Smith's favor. He believed that in the first instance he had been fairly elected, and therefore considered himself entitled to the compensation. The House voted the compensation.

806. The Maine election case of Joshua A. Lowell, in the Twenty-seventh Congress.

Instance of an election contest instituted by the remonstrance of citizens and electors of the district.

The House did not make critical examination in an election case wherein the petitioners were indifferent.

¹ Second session Twenty-sixth Congress, Journal, pp. 173, 189; Globe, pp. 98, 104.

² First session Twenty-seventh Congress, Journal, p. 52.

³ Journal, pp. 76, 282, 335, 350.

⁴ Journal, p. 465.

⁵ Second session Twenty-seventh Congress, Journal, p. 27.

⁶ Globe, p. 979.

On January 13, 1842,¹ the Speaker laid before the House testimony in the election case relating to the seat occupied by Mr. Joshua A. Lowell, of Maine. It does not appear that any other papers were presented to the House or referred in this case, except a protest presented to the House on June 11, 1841.² The sitting Member, in his statement to the Committee on Elections, states that as to this protest or remonstrance, which was signed by George Hobbs and 17 other citizens and legal voters of the district, that it was not "addressed to the House," was not "presented by the Speaker or by a Member in his place," and "a brief statement of the contents thereof" was not made verbally by the introducer, and therefore should not have been received. It appears, however, that the Speaker did present it on June 11.

The committee considered the case, and on March 9³ reported on the "remonstrance and evidence," but gave no discussion of the case, presenting simply a resolution confirming the title of Mr. Lowell to the seat.

On March 16,⁴ after a brief debate, the resolution was agreed to. From this debate, taken in connection with the remonstrance and sitting Member's answer, it is possible to arrive at an understanding of the leading issues of the case.

The remonstrants had specified three objections which, if sustained, would have shown that Mr. Lowell was not elected. A majority of the votes was required at this time for an election of Representative to Congress from Maine, and the remonstrants merely asked that the seat be declared vacant, it not being claimed that any other candidate was elected.

Mr. Lowell in his statement to the committee answered the objections made, and adduced charges as to other irregularities, which, if investigated, would lead to corrections which would increase his majority.

The committee do not state the grounds of their decision.

It is worth noticing, however, that the sitting Member made this point:

The laws of the United States do not provide for taking testimony to be used in cases of contested Congressional elections; and the laws of Maine, while they provide for taking testimony to be used in cases of contested elections in the State legislature, are silent on the subject of contested elections in Congress. Testimony to be used in contested elections to Congress can therefore be taken in Maine only by the consent of parties, or by virtue of some power to be given to commissioners by the House itself. And I here repeat the notice which I gave to the committee, at their session on the first instant, that I shall object to all evidence heretofore taken which has been or may be offered against my right to a seat in the House, as taken *ex parte*, without law and against law.

The committee, however, appear to have examined the evidence and also to have examined evidence on the other side. It was stated that the remonstrants did not take great interest in the case, since the unseating of Mr. Lowell would require a new election, and the people of the district were content to have Mr. Lowell represent them for the remainder of the term.

807. The Virginia election case of Goggin v. Gilmer, in the Twenty-eighth Congress.

The acts of proper officers, acting within the sphere of their duties, are presumed correct unless shown to be otherwise.

¹ Second session Twenty-seventh Congress, Journal, p. 173; Globe, p. 130.

² First session Twenty-seventh Congress, Journal, p. 83.

³ Journal, p. 514; Globe, p. 301.

⁴ Journal, pp. 545, 546; Globe, p. 323; 1 Bartlett, p. 37.

In the absence of fraud the failure of election officers to be sworn should not vitiate a poll.

Discussion of directory and mandatory laws as related to irregularities in conduct of elections.

A minority argument that a poll should be rejected for failure of an election officer to be sworn.

The House did not endorse a proposition to declare a seat vacant because of irregularities on the part of election officers not shown to be corrupt.

A Member being appointed to an incompatible office, a contestant not found to be elected was not admitted to fill the vacancy.

On December 7, 1843,¹ Mr. Willoughby Newton, of Virginia, presented a memorial of William L. Goggin, contesting the seat of Thomas W. Gilmer, of Virginia. This memorial was referred to the Committee on Elections.

On January 25, 1844,² Mr. Lucius Q. C. Elmer, of New Jersey, presented the report of the committee. At a later time Mr. Robert C. Schenck, of Ohio, on the part of himself, and Messrs. Garrett Davis, of Kentucky, and Willoughby Newton, of Virginia, filed minority views.

Mr. Gilmer was returned by a majority of 20 votes over Mr. Goggin. The validity of this majority was attacked on several grounds, which are discussed as follows:

1. The law of Virginia had at that time the following provision:

If the electors, who appear to be so numerous that they can not all be polled before sun setting, or if by rain or rise of water courses many of the electors may have been hindered from attending, the sheriff, under sheriff, or other officer conducting the election at the court-house, and the superintendents of any separate poll, if such cause shall exist at any separate poll for the adjournment thereof, may, and shall, by the request of any one or more of the candidates, or their agents, adjourn the proceedings on the poll until the next day, and from day to day for three days (Sundays excluded), giving notice thereof at the door of the court-house.

In two counties polls were continued by reason of rains, and it was from the votes cast at these postponed elections that all of the sitting Member's majority was obtained. On the poll of the regular first day Mr. Goggin had a majority of 74 votes.

The majority and minority differed in their interpretation of this law and as to whether or not the acts of the elections officers were in accordance with its provisions. The majority say:

It being a clear principle that the acts of the proper officers, acting within the sphere of their duties, must be presumed to be correct unless shown to be otherwise, it is incumbent on Mr. Goggin to prove, by competent evidence, that the adjournments were, in point of fact, made without the request of any candidate or his agent. This he has failed to do.

The minority say:

While the undersigned believe, therefore, and admit that much should be allowed to the discretion of the officers, and that the first presumption should always be in favor of a sound and rightful exercise of that discretion, yet there is no reason why, in a proper case, there should not be an inquiry

¹ First session Twenty-eighth Congress, Journal, p. 30.

² Journal, pp. 291, 312; Globe, pp. 192, 193, 205; House Report No. 76, pp. 1 and 129.

into the sufficiency of the cause assumed by them for their action. The undersigned are of opinion, also, that such judgment of the officers conducting the election, so far as they may have acted in reference to that which the law in any way leaves to their discretion, ought not to be disturbed or set aside, except in a case of clear and flagrant error or wrong.

2. The petitioner alleged that certain election officers were not sworn.

The majority report says:

Without stopping to inquire whether the votes taken in a county or district ought to be rejected, and the voters be thus disfranchised, or the people put to the expense and trouble of a new election, on account of the officers neglecting a part of their duty, even so important a matter as that of being sworn, in a case where there is no allegation that the omission produced any practical evil, the committee are of opinion that the evidence produced does not amount to even *prima facie* proof that the superintendents conducting the elections * * * were not sworn.

The majority examine this evidence. The minority, while not agreeing entirely, say:

Great looseness and negligence appear to have prevailed at almost every precinct in the district. * * * The undersigned, however, have been always satisfied with anything approaching to a substantial compliance with what the law prescribes. They believe that whenever a failure of obedience to these directory provisions does not necessarily involve the probability of a wrong or tend to make a dangerous precedent by taking away some of the substantial safeguards which are to secure the purity of elections, such failure ought not to be treated as sufficient to make void the apparent returns. Every regulation in relation to elections—of time, place, manner, form of vote, officers who are to conduct them, poll books, returns, and whatever else pertains to the exercise of that invaluable franchise of the citizen—is, in fact, directory; but there are some of these regulations more substantive and important in their use and character than others; and somewhere it is necessary to draw the line, distinguishing between that which is proper, but not essential, and that which so enters into the essential character of a good election that a failure in it should be held a fatal defect. Of this latter class the undersigned believe to be the requirement of an oath from the election officers.

The minority refer to the cases of *McFarland v. Purviance*, *McFarland v. Culpepper*, *Porterfield v. McCoy*, *Easton v. Scott*, and *Draper v. Johnston*.

As a result of their examination the majority of the committee found the sitting Member elected by at least a majority of 4 votes, even allowing contentions which they did not admit. Therefore they reported a resolution confirming the title of Mr. Gilmer to the seat.

The minority found as the result of their examination that Mr. Goggin had a majority of 30 votes. They say:

They are clearly satisfied that Mr. Gilmer, the sitting Member, has not obtained a majority of the votes legally taken in the district entitling him to retain his place as a Representative in this body. But such result being produced (in part at least) by the failure or duty or misconduct of officers, whose action should not be permitted to interfere with an opportunity afforded to the electors of the district to express clearly and with certainty their will, by a properly ascertained majority, the undersigned do not agree that the seat, if thus vacated, ought to be given to Mr. Goggin. They recommend, therefore, the passage of the following resolution:

Resolved, That the seat now held by Thomas W. Gilmer, as Representative from the Fifth district of Virginia in this House, is hereby declared vacant, and that a communication be sent to the governor of that State to inform him of that fact that an election may be made by the people of that district to fill the vacancy.

On February 15,¹ before the report was acted on, a message of President Tyler

¹ Senate Executive Sourrial, 1841–1845, pp. 235, 236.

was received in the Senate, nominating Mr. Gilmer as Secretary of the Navy, and on the same day the nomination was confirmed.

On February 16¹ Mr. Willoughby Newton, of Virginia, proposed the following:

Ordered, That William L. Goggin have leave to withdraw his memorial contesting the right of Thomas W. Gilmer to a seat as a Member of the House of Representatives.

Mr. Newton stated that Mr. Goggin did not concede that Mr. Gilmer had been elected, but as the latter had sent his resignation to the governor of Virginia the object of the contestant, which was to procure another trial before the people, had been attained.

The House agreed to the order without division.

On February 17² Mr. Gilmer's resignation was announced in the House.

On May 10³ Mr. Goggin, with credentials showing his election to fill the vacancy caused by Mr. Gilmer's resignation, appeared and took his seat.

808. The Massachusetts election case of Osmyn Baker, in the Twenty-eighth Congress.

Instance of an election contest instituted by a memorial from citizens of the district.

The parties complaining of an undue election failing to present evidence, the House did not pursue the inquiry.

On February 5, 1840,⁴ Mr. William Parmenter, of Massachusetts, presented, a memorial of citizens and legal voters of the Sixth Congressional district of Massachusetts, remonstrating against the return of Osmyn Baker, by the governor and council of that State as a Member of the House, and praying that his seat may be vacated for the reason that he did not receive a majority of the votes given by the legal voters.

This memorial was referred to the Committee on Elections.

On March 19⁵ a further representation and memorial in this case was presented and referred.

On February 24⁶ the Committee on Elections was authorized to send for persons and papers in reference to this case.

On July 17⁷ Mr. John Campbell, of South Carolina, from the Committee on Elections, reported this resolution, which was agreed to:

Resolved, That the Committee on Elections be discharged from the further consideration of the petitions of certain electors of the Sixth Congressional district of the State of Massachusetts, alleging that Osmyn Baker, the sitting Member from that district, was not duly elected a Member of the House of Representatives, there being no evidence produced to the committee in support of the allegations of the petitioners, and the time limited by agreement of parties and the authority of the committee for completing the taking of the same having expired on the fourth Monday of May last.

¹ House Journal, p. 414; Globe, p. 289.

² Journal, p. 416; Globe, p. 291.

³ Journal, p. 890.

⁴ First session Twenty-sixth Congress, Journal, p. 278; Globe, p. 164.

⁵ Journal, p. 638; Globe, pp. 278, 279.

⁶ Journal, pp. 429-433.

⁷ Journal, p. 1300.

809. The Virginia election case of Botts v. Jones, the Speaker, in the Twenty-eighth Congress.

The seat of the Speaker being contested, he vacated the chair on every question relating to the contest.

The Speaker's seat being contested, the House directed that the Elections Committee be appointed by the Speaker pro tempore.

On December 4, 1843,¹ the House elected John W. Jones, of Virginia, Speaker. On December 7,² Mr. John Quincy Adams, of Massachusetts, indicated his purpose to present the memorial of John M. Botts contesting the seat of John W. Jones, of Virginia. The Speaker thereupon called Mr. Samuel Beardsley,³ of New York, to the chair. Then Mr. Adams presented the memorial, which was ordered to be referred to the Committee on Elections when appointed. Later in the same day⁴ the Speaker, by general consent, stated that it seemed proper for him to ask the House that he be relieved of the appointment of the standing Committee on Elections in view of the fact that his own seat was contested. The Speaker again called Mr. Beardsley to the chair, and after debate, by a vote of 98 to 48, the House decided that Mr. Beardsley should appoint the committee.

Mr. Beardsley thereupon appointed the committee, Mr. William W. Payne, of Alabama, being chairman.

On December 13⁵ the Speaker again left the chair, calling Mr. Linn Boyd, of Kentucky, as Speaker pro tempore.

Then it was ordered, on motion of Mr. L. Q. C. Elmer, of New Jersey, a member of the Committee on Elections, that all documents in possession of the clerk in the case of Botts v. Jones be referred to the Committee on Elections.

On May 21, 1844,⁶ the Speaker called Mr. John B. Weller, of Ohio, to the chair, and thereupon Mr. Elmer submitted the report of the majority of the Committee on Elections. Again, on May 31,⁷ the Speaker called Mr. Weller to the chair, and Mr. Willoughby Newton, of Virginia, submitted the views of the minority.

810. The case of Botts v. Jones, continued.

A person whose vote has been received by the officers of election is presumed to be qualified.

Instance wherein by agreement of parties evidence in an election case was taken under a State law.

A poll fairly conducted should not be set aside because an election officer had not been sworn.

The issues in the case were as follows:

The testimony in the contest had been taken by agreement of the parties according to the Virginia law regulating contests before the State legislature, and acting in accordance with that practice each party considered himself bound to establish the right of the voter challenged by the other party. The committee

¹ First session Twenty-eighth Congress, Journal, p. 8.

² Journal, p. 30; Globe, p. 18.

³ Mr. Beardsley belonged to the majority party in the House.

⁴ Journal, p. 40; Globe, p. 21.

⁵ Journal, p. 50.

⁶ Journal, p. 948; Report H. of R., No. 492.

⁷ Journal, p. 989; Report H. of R., No. 520.

expressed the opinion that every voter admitted by the regular officers authorized to decide the question at the polls ought to be considered legally qualified, unless the contrary be shown. But as the parties had proceeded on the contrary principle, the committee conformed its examination to the Virginia practice.

At one precinct there was evidence showing that the sheriff and one of the superintendents were not sworn, as required by law. The majority of the committee considered this evidence taken without the notice required by the Virginia law, and were therefore not disposed to give it full effect. The minority held that, there being no law of any kind expressly governing the taking of testimony, the rules of convenience and propriety prescribed by the courts should hold, and that the evidence had been properly taken. The majority considered that at this time the functions formerly exercised by a sheriff at Virginia elections had so far ceased as to render the objection as to the oath immaterial. The minority, while conceding that he could no longer admit or reject a vote, found that he was still custodian of the polls and had important duties to perform. Also one of the two superintendents was not sworn, and the majority admit that this was "irregular and illegal," but do not think the poll should be set aside as wholly null and void where it appears to have been fairly conducted. The minority insisted that the votes of this precinct should be thrown out, "not being disposed to regard these oaths, solemnly prescribed by the wisdom of the law-making power, as mere idle forms." Had these votes been thrown out it would have made no difference in the result.

811. The case of *Botts v. Jones*, continued.

The House rejected votes cast by persons not naturalized citizens of the United States, although entitled to vote under the statutes of a State.

No fraud or injury being shown, the proper acts of an unqualified or unauthorized election officer do not vitiate the poll.

A contestant admitted to be heard in an election case is governed by the hour rule of debate.

The minority, in their views, also state the following:

A number of votes were stricken from the poll of Mr. Botts upon the ground that, although the voters, who were by birth foreigners, had taken the oath of fidelity to the Commonwealth, under the statutes of Virginia they were not strictly citizens of the United States. A large majority of the committee being of opinion that, as the power of the Federal Government "to enact uniform laws upon the subject of naturalization" is, when exercised, exclusive, the statutes of Virginia prescribing an oath of fidelity to the Commonwealth and declaring the mode in which persons shall become citizens of Virginia, are merely void; and that such persons, although treated by the laws of Virginia as citizens, can not exercise the right of suffrage for Members of the House of Representatives, which right is guaranteed by the Constitution to all "free white male citizens of the Commonwealth" possessing other prescribed qualifications. From this opinion one of the undersigned dissents; and, whether such persons are technically citizens or not, thinks they ought to come within the description of persons upon whom the right of suffrage is conferred by the constitution of the State; and being permitted, under its provisions, "to vote for members of the most numerous branch of the State legislature," ought not to be denied the privilege of voting for Members of the House of Representatives.¹

In the House Mr. Robert C. Schenck, of Ohio, called attention to the importance of this question.²

¹This minority report is signed by Messrs. Willoughby Newton, of Virginia, Robert C. Schenck, of Ohio, and Garrett Davis, of Kentucky.

²See discussion below.

A question as to the appointment of writers at the polls involved a construction of the Virginia laws as to the number of these officials required. There was disagreement as to the meaning of this law, but the majority say:

Should the true construction of the laws be considered to require the superintendents to appoint more than one writer to keep the poll of each officer voted for, still the committee do not think that the omission to do so is such an irregularity as to render the election null and void, and thus deprive the people of their votes or put them to the trouble and expense of a new election. No fraud or unfairness is complained of, nor is it shown that any mistakes were made by the writer employed. The memorialist was himself present during a considerable part of the day, saw how the election was conducted, and made no objection to it. No decision of this House, so far as the committee are informed, has ever sanctioned such a result. The case of *Easton v. Scott*, referred to by Mr. Botts in his memorial, is entirely different from this.

The minority views also expressed the opinion that Mr. Botts's contention on this point was untenable.

As a result of their conclusions the majority recommended this resolution:

Resolved, That John W. Jones is entitled to his seat in this House as a Representative from the Sixth Congressional district of the State of Virginia.

The minority did not dissent from the conclusions embodied in this report.

On May 31,¹ in the House, Mr. Robert C. Schenck, of Ohio, called attention to the fact that the decision of the committee had turned on the qualifications of voters, and that if voters admitted to citizenship in the State without being citizens in every respect had not been held to be disqualified, Mr. Botts would have had a majority of several votes. Mr. Schenck said that he had concurred in excluding the class of voters excluded by the majority because the admission of such votes (under the qualifications prescribed by the States) would be rendering nugatory the power granted to the Congress of the United States, the States being permitted to admit to citizenship those who were not recognized as citizens in every respect, and particularly under the laws of the United States. It was true it would cut off thousands of voters in Michigan and other States, and he would say to his New England friends that it would "cut off the votes of all colored persons." To this Mr. Stephen A. Douglas, of Illinois, a member of the Committee on Elections, replied that he did not understand the decision of the committee as involving the question as to whether that class of voters in other States should be admitted or excluded. He held that any State of the Union had a right to prescribe the qualifications of voters within the State, and that this House had not the power to reject a Member elected by such voters.

On May 31² leave was granted to Mr. Botts to be heard in person at the bar of the House.

On June 6³ the case came up in the House, the Speaker calling Mr. John B. Weller, of Ohio, to the chair.

On motion of Mr. George W. Hopkins, of Virginia, it was—

Ordered, That the Speaker of this House, whose right to a seat as a Member of the House is contested, have leave to speak upon this resolution, notwithstanding that clause of the Manual which restrains the Speaker from addressing the House except upon questions of order.

¹ *Globe*, p. 634.

² *Journal*, p. 990.

³ *Journal*, pp. 1011–1014; *Globe*, pp. 648, 649.

Mr. Garrett Davis, of Kentucky, having raised a question as to whether the petitioner would be limited by the hour rule, the Speaker pro tempore held that he would be, and on appeal the decision was sustained, yeas 102, nays 76.

Thereupon Mr. Botts addressed the House, and was followed by Mr. Jones. the Speaker.

Then, on the question of agreeing to the resolution reported by the Committee on Elections, there appeared, yeas 150, nays 0.

812. The Florida election case of Brockenbrough v. Cabell, in the Twenty-ninth Congress.

A State law requiring returns to be made to the secretary of state within a given time was held to be directory merely and not to prevent the House from counting the votes.

A certificate of a State officer with belated returns from election inspectors (whose authority to make such returns was doubtful) was admitted although procured ex parte.

The House declined to recommit an election case in order to count votes in precincts whence no votes had been returned or proven.

The petition of a contestant was admitted although defective in its specification of particulars.

There being no law of Congress to regulate election contests, proceedings taken according to State law were approved.

Instance wherein questionable prima facie right was not disturbed pending decision as to final right.

In 1846¹ the Committee of Elections reported in the case of Brockenbrough v. Cabell, from Florida.

The contestant objected that, from the lawful returns, he was entitled to the credentials that had been given to the sitting Member by the governor, and that the greatest number of votes of the legally qualified voters were cast in his favor and not in favor of the sitting Member.

Objection was made by the sitting Member that the petition of the contestant should specify the particulars of the illegalities complained of as to the return; but the committee deemed the petition—which was somewhat more definite than given above, but did not go into particulars—sufficient and determined to proceed with the inquiry.

The point on which the case turned was the construction of the laws of Florida in regard to the returns. The contestant contended that under the law the judges of probate were the returning officers, and the majority of the committee concurred in this view. The sitting Member contended that the inspectors of precincts were the returning officers, and the minority of the committee concurred in this view. The committee was as nearly evenly divided in the case as possible. It is also to be noted that a large portion of the total vote was returned by election inspectors, the remainder being by judges of probate or legal substitute—the county clerk.

¹First session Twenty-ninth Congress, House Report No. 35; 1 Bartlett, p. 79; Rowell's Digest, p. 123. The report was submitted by Mr. Hannibal Hamlin, of Maine; the minority views by Mr. Erastus D. Culver, of New York.

This indicates a division of opinion in the State as to who were the proper returning officers.

The law of the State further provided indisputably that the secretary of state should count the returns at the expiration of thirty days after the election and certify the result to the governor, who should issue the commission.

At the expiration of thirty days the secretary of state had received returns from judges of probate in fourteen counties, from a county clerk in one county where there was no judge of probate, and from precinct inspectors in eight counties. The fifteen counties returned by judges of probate and the county clerk showed a majority for Mr. Brockenbrough, but with the eight counties returned by inspectors added, the majority was for Mr. Cabell. The secretary of state certified this result to the governor, who issued his certificate to Mr. Cabell, who had the majority of inspectors' returns and also of all the returns. The contestant objected that only the returns from the judges of probate (and the county clerk where there was no judge) were lawful returns, and therefore that the certificate should have been issued to him instead of to Mr. Cabell.

After the expiration of the thirty days returns were received from judges of probate in three counties, from two of which inspectors' returns had been counted by the secretary of state.

Also after the expiration of thirty days inspectors' returns were received from Monroe County, the same being the only returns of any kind from that county.

If only the belated returns by judges of probate were added to the tabulation of the secretary of state, Mr. Cabell would still be elected.

But if the Monroe County returns also should be added, Mr. Brockenbrough would be elected.

Thus it appeared that if only returns of judges of probate were to be admitted as lawful—the question as to time of return being waived—Mr. Brockenbrough was elected.

And if—the time limit being waived—all the votes returned from all the counties should be counted, still Mr. Brockenbrough was elected.

The committee did not question the *prima facie* right of Mr. Cabell to the seat.

As to the final right, the decision was complicated by a curious condition of rule as to evidence.

The contestant offered the certificate of the secretary of state as to the belated judge of probate returns from the three counties. The sitting Member objected, that he had not been notified of an intention to procure this evidence; that the returns were received after the expiration of thirty days, and that, as judges of probate were not proper returning officers, their certificates and that of the secretary were extra-official. These objections were overruled, and the principle seemed to be thereby established that the judges of probate and not the inspectors were the returning officers.

Next the contestant offered the certificate of the secretary of state with extract of returns of inspectors of Monroe County. This was objected to on the ground that sitting Member had not been notified of the procuring or production of it; that it was not a legal return, and that it was inadmissible under the decision just made

that the judges of probate were the returning officers. The majority of the committee decided the last objection well taken and rejected the evidence.

This decision left the majority for the sitting Member, and it was originally the intention of the larger portion of the committee to so report. The argument was very strong that such ex parte depositions as those relating to Monroe County should not be admitted. *Spaulding v. Mead* was quoted in support of this principle.

The minority contended that these returns might not be admitted on the plea that the other inspectors' returns had been admitted, because evidence as to the other inspectors' returns was offered by the contestant as part of a document tending to prove his right to a seat, and therefore that he could not ask that the part of the paper which favored his adversary should be disregarded after the committee had received it. It was like the case of an admission proved by a party; he must take the whole of it, that against him as well as that for him. After proving a state of facts by his own evidence, the contestant might not disavow part of the evidence and seek to avail himself of the remainder. Nor could it be used subsequently as a pretext for the introduction of confessedly illegal ex parte evidence.

The majority of the committee concluded that the law requiring the returns to be made to the secretary of state to be directory merely, and that to throw out votes returned after that time would lead to bad results and tend to defeat the will of the people.

For the same reason, as expressed by Mr. Hannibal Hamlin, of Maine, chairman of the committee, in the debate, the committee decided not to confine itself to its narrow construction that the legal returns were those returned by the judges of probate.

And following this principle further, the majority decided that, as the inspectors' returns of the eight counties counted by the secretary of state were admitted, so also the inspectors' returns of Monroe County should be admitted.

This conclusion as to Monroe showed the election of Mr. Brockenbrough, and the committee reported that Mr. Cabell was not entitled to the seat and that Mr. Brockenbrough was entitled to it.

In course of consideration of this case the committee overruled the objection of the sitting Member that contestant's notice of contest had not been seasonably given. The committee found that the proceedings had been taken in accordance with the requirements of a State law relating to contests before the State legislature only; but held by the committee to be proper as a rule in this case.

As a result of their conclusions the majority of the committee reported the following resolutions:

Resolved, That E. Carrington Cabell, returned to this House as a Member thereof from the State of Florida, is not entitled to his seat.

Resolved, That William H. Brockenbrough is entitled to a seat in this House as a Representative from the State of Florida.

The minority recommended the following:

Resolved, That William H. Brockenbrough has not supported his petition, and that Edward C. Cabell is entitled to his seat in this House.

The report was debated on January 20, 21, 22, 23, and 24.¹ It appeared from the debate that from a few precincts in the district no returns had been made.

¹ *Globe*, pp. 222, 230, 236, 238.

Indeed, in one of them there was doubt as to whether or not an election had been held. There was no evidence to show what had been done at these precincts, and therefore during the debate Mr. Alexander D. Sims, of South Carolina, proposed¹ a motion reciting this lack of certain returns, and providing that the report in this case be recommitted to enable further testimony to be taken. Mr. Hamlin admitted that there were precincts from which no returns had been received; but by informal statements made before the committee by the contestant, and apparently not disputed by the sitting Member, the committee had understood that the votes of such precincts were in favor of contestant. In one county there was nothing to show whether an election had been held or not.

The motion of Aft. Sims, under the practice prevailing at that time, was thrust aside by the ordering of the previous question. Then the first resolution, unseating Mr. Cabell, was agreed to,² yeas, 105; nays, 80. The resolution seating Mr. Brockenbrough was agreed to, yeas 100, nays 85.

Mr. Jacob Thompson, of Mississippi, then moved³ to reconsider this vote in order that the case might be delayed until testimony might be produced as to the votes of the missing precincts. He based this proposition on the statement of the sitting Member to the House that there were precincts from which no returns had been made, and also the further statement of sitting Member that the counting of the votes of those precincts would give him a majority of the votes in the district.

Mr. Thompson's motion to reconsider was disagreed to, yeas 87, nays 91.

Mr. Brockenbrough then appeared and took the oath.

813. The New Jersey election case of Farlee v. Runk in the Twenty-ninth Congress.

Discussion of the meaning of the word "residence" as related to the qualifications of a voter.

The House, by a close vote, sustained the contention that certain students were residents in the place wherein they attended college

In 1846,⁴ in the contested election case of Farlee v. Runk, from New Jersey, the returns showed that—

	Votes.
Mr. Runk received	8,942
Mr. Farlee received	8,926
Majority for Mr. Runk	16

Mr. Farlee represented to the House by his memorial that this majority was obtained by the illegal votes of 36 students in the college and seminary at Princeton.

The committee divided on the question of the right of the students to vote, the majority finding that 19 of them were entitled, and the minority finding that none were entitled under the law and constitution of New Jersey.

¹ Journal, p. 281; Globe, p. 230.

² Journal, pp. 293, 294, 295.

³ Journal, p. 296; Globe, p. 238.

⁴ First session Twenty-ninth Congress, House Report No. 310; 1 Bartlett, p. 87; Rowell's Digest, p. 124. The majority report was by Mr. James C. Dobbin, of North Carolina; the minority views by Mr. Lucien B. Chase, of Tennessee.

As the voting in New Jersey was by ballot, both minority and majority experienced difficulty in determining what the actual effect of the students' votes had been. The 19 whom the majority considered entitled to vote had made depositions in which 4 acknowledged that they voted for Mr. Runk and 1 that he voted for Mr. Farlee. The other 14 availed themselves of their privilege not to answer and declined to declare how they voted. The majority of the committee did not attempt to ascertain for whom the 14 voted, since it was not necessary under their contention that the votes of the students were legal, and recommended a resolution that Mr. Farlee was not entitled to the seat.

The minority, following the example in the New Jersey case of 1840, contended that secondary evidence should be admitted, and from the deposition of a person who testified that 16 of the students whose votes were not known were Whigs, concluded that those 16 voted for Mr. Runk, the Whig candidate. With the 5 who acknowledged their votes, the minority arrived at a deduction of 20 votes from Mr. Runk and 1 from Mr. Farlee. This left a majority of 3 for Mr. Farlee, and the minority reported the conclusion that he was entitled to the seat.

The argument on the question as to whether or not the students were qualified to vote involved the question of residence. The then recently adopted constitution of New Jersey defined voters as "every white male citizen of the United States, of the age of twenty-one years, who shall have been a resident of this State one year and of the county in which he claims his vote five months next before the election." There was, moreover, a law passed in 1844 expressly declaring that students so circumstanced as those in question should not vote in New Jersey. The majority, however, held that this law, which had been passed under the old constitution, was of no effect under the new constitution. The minority, while not relying on this law to support their contention, yet denied that it had become inoperative.

The main issue, therefore, was joined on the meaning of the word "resident" in the constitution. The majority admitted that most of the students at Princeton would be incapable of voting, since they had left their homes for a temporary purpose, meaning to return. But they conceived that the few who had voted were entitled to do so, on the showing made in their depositions, "for they swear that they left their last residence *animo non revertendi*, and adopt Princeton as their residence for a space of time—not very brief, not certain as to its duration—undertermined in their minds as to the adoption of any particular residence should they choose to abandon Princeton." The supreme court of New Jersey, in the case of *Cadwallader v. Howell and Moore*, decided in November, 1840, had declared:

The residence required in the laws of this State to entitle a person to vote at an election means his fixed domicile or permanent home, and is not changed or altered by his occasional absence, with or without his family, if it be *animo revertendi*. A residence in law, once obtained, continues without intermission until a new one is gained.

But the opinion further went on—

The place where a man is cormorant may, perhaps, be properly considered as *prima facie* the place of his legal residence; this presumption, however, may be easily overcome by proof of facts to the contrary. If a person leave his original residence *animo non revertendi*, and adopt another (for a space of time, however brief), if it be done *animo manendi*, his first residence is lost. But if, in leaving his original residence, he does so *animo revertendi*, such original residence continues in law, notwithstanding the temporary absence of himself and family.

The minority contended that residence was defined by Judge Story, who said in his Conflict of Laws that "domicile, in a legal sense, is where the person has his true, fixed, and permanent home and principal establishment, and to which, whenever he is absent, he has the intention of returning." All of the students testified that they went to Princeton for purposes of study. Some of them stated that after they had accomplished their objects they intended to leave Princeton; others that they should go "wherever the providence of God may call them." There was no proof whatever that they intended to make Princeton their "true, fixed, and permanent home;" no evidence that they intended to remain at Princeton an "unlimited time." The minority call attention to the fact that several of the students who voted had already left Princeton and the committee had been unable to procure their testimony. These students were entered on the college catalogue as residing in other places; several in other States. This had undoubtedly been done on the authority of the students themselves. Although the students may have left their homes *animo non revertendi*, yet there was neither positive nor presumptive proof that they came to Princeton *animo manendi*. The evidence showed the contrary. The court in the case above quoted had held—

It is for the reason that the students of our colleges, the inmates of our law schools and medical universities, and hundreds of others who are scattered on land and sea, engaged for the time being in the prosecution of some transient object, are considered in law as residing in their original homes, although in point of fact they may be living for the time being elsewhere.

The majority had reported a resolution as follows:

Resolved, That Isaac G. Farlee is not entitled to a seat in this House as a Representative from the State of New Jersey.

The minority recommended the following:

Resolved, That John Runk is not entitled to a seat upon this floor.

Resolved, That Isaac G. Farlee, having received a majority of the legal votes of the legally qualified voters of the Third Congressional district of New Jersey, is entitled to his seat upon this floor.

Mr. Hannibal Hamlin, of Maine, on March 3,¹ when the report was considered, moved to strike out all after the word "resolved" in the resolution of the majority, and insert the text of the two minority resolutions.

This motion was decided in the negative, yeas 76, nays 112.

Thereupon the House, by a vote of yeas 119, nays 66, agreed to the resolution of the majority of the committee, declaring petitioner not entitled to the seat.

Thereupon Mr. Hamlin, as a question of privilege, offered the following:

Resolved, That John Runk is not entitled to a seat in this House.

A motion that the resolution lie on the table was disagreed to, yeas 93, nays 99.

Then, on agreeing to the resolution, there appeared yeas 96, nays 96.

"The House being equally divided," says the Journal, "the Speaker voted with the nays, and so the House refused to agree to the said resolution; and Mr. Runk, the sitting Member, retains his seat."

¹ Journal, pp. 431, 477–483; Globe, pp. 448, 454, 456.

814. The New York election case of Monroe v. Jackson, in the Thirtieth Congress.

Discussion of the qualifications of voters in respect to residence of paupers in an almshouse.

Discussion of the evidence required to establish for whom a voter has cast his ballot.

Form of resolution by which the House, in 1848, provided for taking testimony in an election case.

The earlier regulations for taking testimony in an election case provided that the depositions should be forwarded to the Speaker.

On March 25, 1848,¹ the Committee on Elections reported in the case of Monroe v. Jackson, from New York. This was a case wherein the contestant charged fraud sufficient to account for the majority of 143 votes returned for the sitting Member. The majority of the committee satisfied itself of the truth of the charges and reported in favor of the contestant. The minority contended that there was not positive proof sufficient to set aside the result certified to by the governor of the State, and recommended resolutions confirming the sitting Member in his seat.

The House, on April 19,² by a vote of 160 to 13, declined to agree to a proposition that, as it did not satisfactorily appear that either was elected, the seat should be declared vacant. Then the propositions of the minority, that Mr. Jackson was entitled to the seat and Mr. Monroe was not entitled to it, were disagreed to—yeas 102, nays 93.

The question recurring on the first proposition of the majority, that Mr. Jackson was not entitled to the seat, it was decided in the affirmative—yeas 103, nays 93.

On the second proposition of the majority, that Mr. Monroe was entitled to the seat, there appeared 91 yeas and 104 nays.

So the seat was left vacant.

While a large number of frauds and irregularities were alleged, and attempt was made to sustain them by evidence of varying degrees of strength, the principal and most tangible issue in the case arose over the charge that 163 paupers from an almshouse had cast their ballots for the sitting Member, and that to these his apparent majority was due. The law of New York provided that no person should “be deemed to have lost or acquired a residence by living in any poorhouse, almshouse, hospital, or asylum, in which he shall be maintained at public expense.” The right of the paupers to vote in the election district where their legal residence was could not be questioned, but neither majority nor minority contended that they might vote on their almshouse residence.

The issue was as to the sufficiency of proof. The majority satisfied themselves that the paupers were not qualified voters in respect to residence by the testimony of officers of the almshouse as to names on its books. The minority contended that the voters themselves should have been called to testify as to residence, and

¹First session Thirtieth Congress, I Bartlett, p. 98; Rowell's Digest, p. 126; House Report No. 403. The majority report was made by Mr. Joseph Mullin, of New York; the minority views by Mr. Timothy Jenkins, of New York.

²Globe, p. 643; Journal, pp. 705–709.

that the secondary evidence adduced was not conclusive. Not even the almshouse books were put in evidence.

Elections in New York being by ballot, it also became necessary to show for whom the alleged illegal votes were thrown. Again, the voters were not interrogated, but the majority of the committee satisfied themselves that the illegal votes were for the sitting Member because tickets of his party were distributed at the almshouse, because officers of that institution and those who conveyed the paupers to the polls were of his party, and because witnesses noticed the ballots when cast and professed to distinguish and recognize them by texture of the paper. The minority combated this evidence as too indefinite and inconclusive.

The majority, on the strength of the evidence which they allowed, found for the contestant a majority of 14 votes. The minority denied this conclusion.

The testimony in this case was taken in accordance with this resolution:¹

Resolved, That the parties * * * be, and they hereby are, authorized to take the testimony of such witnesses as either of them may require, by depositions, in conformity to the laws of the State of New York, in force at the time of taking such testimony, on the subject of contested elections in that State: *Provided*, That the parties may, by agreement under their hands, regulate the mode of giving notice and other matters of form, at their discretion; but if no such agreement shall be made, then each party shall give to the other such notice of the time and place of taking such depositions as are prescribed in the aforesaid laws of New York: *Provided, also*, That when such depositions are taken they shall, together with the agreements or notices aforesaid, be sealed up by the officer taking the same and directed to the Speaker of the House.

815. The Iowa election case of Miller v. Thompson, in the Thirty-first Congress.

In earlier times the taking of testimony in an election case was governed by a resolution of the House.

Testimony in an election case, under the earlier practice, was sent to the Speaker and referred by the House.

In 1849 election contests were instituted by memorial.

On December 31, 1849,² Mr. Edward D. Baker, of Illinois, presented the memorial of Daniel F. Miller, claiming election from the First Congressional district of Iowa, and praying to be admitted to the seat occupied by William Thompson. This memorial was referred to the Committee on Elections.

On January 23, 1850,³ the House agreed to a resolution providing for the taking of testimony in accordance with the provisions of the laws of Iowa, and also making certain stipulations not provided for by those laws. It was provided that this testimony should be forwarded to the Speaker, and on March 19⁴ the Speaker laid before the House certain depositions forwarded to him under the resolution.

On June 18, Mr. William Strong,⁵ of Pennsylvania, presented the report of the majority of the committee and Mr. John Van Dyke, of New Jersey, presented the views of the minority.

¹ Journal, p. 174.

² First session Thirty-first Congress, Journal, p. 190.

³ Journal, p. 394.

⁴ Journal, p. 684.

⁵ Journal, p. 1029; House Report No. 400.

The sitting Member, William Thompson, had been returned by an official majority of 386 votes.

The contestant alleged two main objections which, if sustained, would have destroyed this majority. The board of canvassers rejected the vote of Kanesville, which had given Miller, the contestant, 493 votes, and Thompson, the sitting Member, 30. Contestant claimed that this rejection was illegal. The contestant further objected that the canvassers had counted illegally the votes of Boone Township, in Polk County, which were 42 for Thompson and 6 for contestant.

Therefore the questions relating to Kanesville and Boone in Polk County were of prime importance in the consideration of the case. But other questions were involved, and the subject naturally divides itself as follows:

816. The election case of Miller v. Thompson, continued.

Being satisfied as to the intention of the voter, the Elections Committee counted ballots from which the middle initial of candidate's name was lacking.

Votes apparently intended for Congressional candidates, but returned as for a State office, were counted without further inquiry.

1. As to ballots lacking the middle initial of contestant's name.

The contestant claimed that he should be allowed 7 additional votes of Marion County which were given for "Daniel Miller" and were rejected by the canvassers on account of the omission of the initial of the middle name, though the Christian and surnames were correctly described. The committee were unanimously of the opinion that the 7 votes should be counted for contestant. The minority views state:

The committee, therefore, are satisfied that the said 7 votes were honestly intended for the contestant and allow them accordingly.

2. As to certain irregularities in the conduct of an election.

The majority and minority of the committee united in crediting to sitting Member 11 votes and to contestant 3 votes in the town of Wells, in Appanoose County. The minority views state the case as to this precinct:

It does not appear by the election proceedings that the officers of election were sworn., nor is it at all proved in any other way. And although it appears that "W. Thompson" and "D. F. Miller" were voted for for Congress, yet it does not appear how many votes either of them received; and the only mode of inferring that either of them received any votes at all is that the poll book states that for "superintendent of public instruction," William Thompson received 11 votes, and that for the same office D. F. Miller received 3 votes. No proof is brought to bear on this case to prove anything whatever about it, and if ever irregularity or illegality should set aside an entire poll, it should be such as this. But the committee, from a very strong indisposition to deprive the citizen of his right to vote in consequence of the errors and blunders of others, nevertheless allow this vote to be counted.

The vote of the committee on counting these votes was ayes 8, noes 1.

817. The election case of Miller v. Thompson, continued.

In determining the residence of a voter, the intention to remain is held consistent with an intention to change the abode at a future indefinite day.

Instance wherein a committee reported its proceedings, which thereby became a proper subject of debate. (Footnote.)

Residence in a county being a qualification of voters, the votes of non-residents were rejected.

3. As to the qualifications of certain voters whose residence was questioned.

This question concerned certain voters at Kanesville, but is not to be confounded with the different and more important question to be considered later in relation to that place.

Mr. Joseph E. McDonald, of Indiana, in the course of the debate¹ stated that the people of Kanesville were certain Mormons, who had from necessity settled there temporarily on their way to the valley of Salt Lake. They had gathered from all parts of the United States and from foreign countries. Kanesville was only a stopping place for them; they did not regard it as their permanent home. This was shown by the testimony. He thought the law of Iowa conferred the right of suffrage not for domicile merely, but for a residence and interest in the place. "If a citizen of the United States goes abroad," said Mr. McDonald, "and chooses to wander through foreign countries, when he returns home he is not treated as an alien, but resumes the rights he had temporarily laid down. But if an alien comes here to settle and does not become a citizen of the United States in due form of law, he is not entitled to participate in the franchise which belongs to a citizen."

The report of the majority says:

The committee dismiss the * * * objections urged by the sitting Member * * * with the single remark that they are not sustained by the evidence which has been presented. The qualifications of voters in the State of Iowa, as defined in her constitution, are six months' residence in the State of any white male citizen of the United States and twenty days' residence in the county in which the vote is claimed next preceding the election. It is doubtless true that to constitute residence within the constitutional meaning of the term there must be the "intention to remain;" but this intention is entirely consistent with a purpose to change the place of abode at some future and indefinite day. Actual abode is *prima facie* residence, and we are unable to perceive anything in the evidence submitted which removes the presumption of qualification arising from the actual abode of the Kanesville voters within the State.

The vote in the committee on receiving the Kanesville vote was ayes 5, noes 4,² but it seems evident that the principal issue on the vote was not the question herein set forth, but another question, which is considered later.

4. The sitting Member objected to 56 votes cast for contestant in Dallas County at Boone Township on the ground that the voters were nonresidents of the county. The issue involved on this point was largely one of fact. The majority of the committee, by a vote of 6 to 3, decided to reject from the poll for contestant 38 of these votes. The minority say:

These votes were all received as legal votes by the judges of election, who are presumed to have made all due inquiry and to have decided correctly.

Therefore the minority, in the absence of what they considered conclusive proof from the sitting Member, held that the votes should stand.

¹ Globe, p. 1295.

² The report of the committee presents the record of the yea and nay votes on the various questions arising in the committee, and therefore the action of the committee became a legitimate subject of discussion on the floor. (Report No. 400, p. 12; Globe, pp. 1295, 1299.)

818. The election case of Miller v. Thompson, continued.**Votes cast by voters having all qualifications except the required residence within the county were rejected by a divided committee.**

5. The principal question as to the Kanesville votes.

This precinct cast 493 votes for contestant and 30 for the sitting Member.

The minority views say:

It is fully established, as well as admitted, that the persons voting at this precinct had a perfect right to vote in the First Congressional district, and to vote for either the contestant or the sitting Member. It is not pretended that any fraud, injustice, or unfairness was practiced by either the voters or the election officers toward anyone, but everything seems to have been done honestly, fairly, and in good faith, and that the persons voting were legal voters in the district.

The voting precinct of Kanesville, for the election in question, was organized by the authorities of Monroe County under peculiar provisions of the Iowa laws, which provided that sparsely settled communities not within organized counties should be attached for certain purposes to adjacent counties. The minority views claim that at the time of the election in question no one doubted that Kanesville precinct should vote with Monroe County; but that by a survey made after the election it was shown that Kanesville was in fact so situated that it belonged under the technical terms of law with Marion or Mahaska County. The majority report also claimed that even supposing the territory of Kanesville to be properly within the limits assigned to the jurisdiction, yet the laws of Iowa, properly construed, did not give the commissioners of Monroe County the authority to appoint the election officers as they had done; but that the law appointed a different way for the appointment of such officers. The majority say in their report:

By the Constitution of the United States, the times, places, and manner of holding elections, and the qualifications of voters, are left to the control of the States. The elective franchise is a political, not a natural, right, and can only be exercised in the way, at the time, and at the place which may be designated by law. If, by the constitution and laws of Iowa, therefore, it is required that electors should vote only in the counties in which they resided, and at designated places within those counties, it can not be doubted that votes given in other counties, or at other than the designated places, must be treated as nullities. To deny this is to deny to the State the power expressly reserved in the Constitution to prescribe the place and manner of holding the elections—a power essential to the preservation of the purity of elections. Assuming, then, that those who voted at Kanesville were qualified voters, it remains to be considered whether they voted at the place prescribed by law.

The majority conclude that they did not, and continue:

In many of the States the right to vote is confined by law to voting in the ward or township in which the elector resides; and, even under this more stringent provision, votes in other wards or townships have, it is believed, been uniformly adjudged illegal.

The majority further answer another objection:

Nor is their the voters' belief that they were rightly voting at Kanesville at all material, though it may have been their misfortune. Their right to vote was a political right, restricted by their actual residence, and not by what they may have supposed it to be. The opposite doctrine would convert the constitutional provision into a declaration that the voter should vote in the county in which he supposes he resides, and make his franchise dependent upon his own conjecture.

The minority call attention to the fact that the entire board of commissioners of Monroe County and a majority of the election officers at Kanesville were the political friends of the sitting Member. No question was raised against the cor-

rectness of the procedure until after the election. After commenting on the purely technical objections to the votes, the minority conclude that they should not be sustained, "in view of the great principle in our institutions which seeks to afford to all the citizens of the Union the right of suffrage."

In the committee, 5 members voted to receive the votes of Kanessville and 4 voted against the reception.

This question was debated at considerable length on June 26, 27, and 28,¹ when the report was before the House.

819. The election case of *Miller v. Thompson*, continued.

A question as to counting the votes of persons whose position in relation to the boundaries of the district was in doubt.

Instance wherein the majority of a committee agreed on a report, but disagreed on the facts necessary to sustain the report.

An Elections Committee being curiously confused as to its majority and minority conclusions, the House disregarded both.

The report of the Elections Committee not leading to a certain conclusion, the House declared the seat vacant.

The House having negatived a declaration that sitting Member was entitled to the seat, it was then declared by resolution that the seat was vacant.

Instance wherein the minority of an Elections Committee recommended declarations as to the question in issue.

6. The contestant claimed that the votes of Boone Township, in Boone County, which were cast, 42 for Thompson and 6 for Miller, should be rejected because Boone Township was not in the First Congressional district, but in the adjoining district, the Second. The minority views claim that all the persons who voted in Boone Township actually resided at that time in the Second Congressional district, saying:

About this there is no dispute, as the districting line of Iowa places the whole of Polk County in the First district, and the whole of Boone County in the Second district; and the only ground on which it is claimed that these votes given in Boone were correctly counted in Polk County is, that by an act of the legislature of Iowa, approved January 17, 1846, Boone County was attached to Polk County, for election, revenue, and judicial purposes, and that the constitution of that State prohibits the division of counties in making Congressional districts. But, by an act of Congress approved June 25, 1842, every State that is entitled to more than one Representative is required to vote by district * * * and in pursuance of this act of Congress, the State of Iowa, on the 22d of February, 1847, divided herself into two Congressional districts. * * * Now it seems impossible that Congress * * * could have intended that, for Congressional purposes, the inhabitants and residents of one district could lawfully vote in another. And can it be supposed that the State of Iowa, when, subsequently to all these other laws, she ran a line across her territory dividing it into two districts, meant to say that after all that line meant nothing, and that the inhabitants living in one district, when voting for Representatives in Congress, might still vote in the other district?

Therefore the minority favored the exclusion of the votes of Boone.

The majority of the committee, after showing how Boone Township was for judicial and election purposes added to Polk County, says:

The constitution of Iowa declares that any country attached to any county for judicial purposes shall, unless otherwise provided for, be considered as forming a part of said county for election purposes.

¹ Globe, pp. 1293, 1301, 1310,

But, unless the vote of Boone Township be received and counted as part of Polk County, this constitutional provision becomes a nullity, and the voters of Boone are entirely disfranchised. Their vote could be received and counted at no other place. No provision was ever made for their voting in any other county than Polk. The electors at Kaneshville could have voted, had they chosen to do so, in the county lying east of them, to which they had been attached; but these voters could have had no voice in the choice of a Representative, unless their votes had been received as a portion of the vote of the First district, of which Polk County was declared to be a part. It is, however, objected that the constitution also contains the following provision: "No county shall be divided in forming a Congressional, senatorial, or representative district." It is urged that, if Boone is to be considered as forming a part of Polk County, then a county has been divided in forming a Congressional district, and therefore the districting act must be considered as repealing the antecedent act attaching Boone to Polk. To this it may be answered, that if, within the meaning of the constitution, the districting act did divide Polk County by separating Boone Township from it, the act itself is unconstitutional and inoperative, so far as it aims to sever Boone from the county of which, under the constitution and law, it forms a part. Nor does there appear to be the least reason for asserting that it repealed the act attaching Boone to Polk.

Therefore the majority report concludes that the Boone returns should be counted.

It appears that in the committee, on the question of rejecting the Boone returns, there were six ayes and three noes, Mr. Strong, who drew the majority report, being among the noes. So it is evident that while the majority report favors counting the Boone votes, the majority of the committee voted that they should not be counted.

The majority report concluded that the sitting Member had a majority of 15 votes, and recommended this resolution:

Resolved, That William Thompson is entitled to the seat in this House which he now holds as the Representative from the First Congressional district of Iowa.

The minority found that, as a result of their conclusions, the contestant had a majority and was entitled to the seat; but instead of reporting a resolution declaratory of his rights, reported a series of resolutions in form as follows:

Resolved, That the 7 votes cast at Pleasant Grove with the middle letter of the contestant's name omitted be counted.

Resolved, That the vote cast at Kaneshville be allowed and counted as a legal vote.

And in five other resolutions the remaining points in the case were included.

In the debate in the House on June 27¹ Mr. E. W. McGaughey, of Indiana, a member of the Committee on Elections, commented on the curious state of the report. A majority of the committee had concluded that the sitting Member was elected, but the Members who composed that majority did not all agree on the reception of certain votes needed to elect the sitting Member. Mr. McGaughey said:

Mr. Ashe votes with the majority in favor of the admission of the votes at Kaneshville, and with the minority against the rejection of Boone Township, in the Second district, and as it requires the admission of the first and the rejection of the other to decide the case in favor of Mr. Miller, it follows that Mr. Ashe comes to the final result by his individual computation that Mr. Thomas is elected, while, on the other hand, Mr. Harris, of Alabama, and Mr. Harris, of Tennessee, voted in committee with the minority against the admission of Kaneshville, and with the majority in favor of the rejection of Boone Township, in the Second district; but as they are in the minority against the Kaneshville vote, although in the majority in regard to the other question, they can by their computation arrive at the final conclusion that Mr. Thompson is elected. This presents the singular anomaly of men agreeing in a result,

¹ Globe, p. 1299.

and disagreeing about the very facts necessary to produce that result. Now, sir, I maintain, that inasmuch as a majority of the committee agree upon a state of facts which shows conclusively that the contestant has received a majority of the legal votes, that it follows as a necessary consequence that the honorable chairman had no right to make a report which denies the right to a seat of the person thus decided to have received a majority of the votes, and that his report, submitted under such circumstances, should not and can not be regarded as the majority report.

The report was debated on June 26 to 28,¹ and on the latter date the resolutions of the minority, with an added resolution declaring Daniel F. Miller, the contestant, entitled to the seat, was offered as a substitute for the resolution reported by the majority, confirming the title of the sitting Member.

On the substitute there appeared, yeas 95, nays 94. Thereupon, the Speaker voted with the nays, making a tie vote, and so the amendment failed.

The question recurring on the resolution of the majority declaring William Thompson, the sitting Member, entitled to the seat, there appeared, yeas 94, nays 102. So the House declined to affirm that the sitting Member was "entitled to the seat."

Some question arose as to the effect of this vote, and whether or not it produced a vacancy such as would authorize the Speaker to notify the executive of Iowa. After debate² Mr. McGaughey, offered this resolution, which was ruled by the Speaker³ to present a question of privilege:

Resolved, That there is now a vacancy in this House in the representation from the First Congressional district of the State of Iowa, and that the fact of vacancy be notified to the executive of the State of Iowa by the Speaker of this House.

This resolution was agreed to, yeas 108, nays, 84.

820. The Pennsylvania election case of Littell v. Robbins, Jr., in the Thirty-first Congress.

In 1850 election contests were yet instituted by memorial and conducted by rule laid down by the House.

The records and returns of election officers are presumed to be correct and are to be set aside only on conclusive proof.

Discussion of degree and kind of evidence required to rebut the presumption in favor of the acts of election officers.

On February 4, 1850,⁴ Mr. Joseph R. Chandler, of Pennsylvania, presented the memorial of John S. Littell representing that he was duly elected a Representative from the Fourth Congressional district of Pennsylvania, and praying an opportunity to establish his right to the seat occupied by John Robbins, Jr. This memorial was referred to the Committee on Elections.

On January 29,⁵ there being no law at that time regulating the conduct of contested elections, the House agreed to a resolution governing the taking of testimony and the forwarding of the depositions.

On August 19,⁶ Mr. William Strong, of Pennsylvania, presented the report of

¹ Globe, pp. 1292, 1299, 1305, 1315; Journal, pp. 1057-1066.

² Globe, pp. 1316, 1317; Journal, p. 1065.

³ Howell Cobb, of Georgia, Speaker.

⁴ First session Thirty-first Congress, Journal, p. 223.

⁵ Journal, p. 426.

⁶ Journal, p. 1275; House Report, No. 488.

the majority of the committee in favor of sitting Member; and Mr. John Van Dyke, of New Jersey, minority views in favor of declaring the seat vacant.

The official majority for Mr. Robbins was 410. In the Penn election district of Philadelphia, 924 votes were returned for Mr. Robbins and 169 for Mr. Littell. The latter alleged frauds which diminished his actual vote in the district from 263 to 169, and increased the actual vote of the sitting Member from 445 to 924.

The sitting Member presented no testimony. The testimony relied upon by the contestant principally was that given by a committee of citizens who stood by the window through which the votes were passed to the election officers. In one precinct of the Penn district the list of the committee showed 269 less voters than were returned by the officers within—all of whom were of the same party as the sitting Member. At the other precinct—where the election board was also partisan—the committee counted 167 voters less than were recorded by the official returns. It further appeared that the return of the election showed the names of more persons than were on the registration lists provided by law; and it also appeared that an effort to find voters recorded by the election officers, but not recorded by the committees who watched the voting, failed, although the contestant caused officers with subpoenas to search for them.

It was asserted by the majority of the committee, and admitted by the minority, that the contestant had not proven conclusively that any votes given for him had been counted for the sitting Member. It was also evident that the evidence of the committees of citizens who stood by the polling places, even if admitted to be conclusive, did not show a sufficient number of fraudulent returns to overcome the majority of the sitting Member; but the minority urged that the fraud proven was sufficient to justify the throwing out of the whole vote of the Penn division. The elimination of that vote would give the seat to the contestant; but the minority merely recommended that the seat be declared vacant.

The majority of the committee, however, did not give to the evidence of the committees of citizens the importance that the minority attributed to them. The majority considered that—

in the absence of anything to rebut it, the presumption must be in favor of the correctness of the record kept by the officers of the election and their return." Fraud is not to be presumed" is a maxim not only of law but of common justice. The means of knowledge, the facilities for accuracy, the impossibility of inattention, and the responsibilities connected with the failure to discharge their duty, all unite to secure a credence to the acts of the officers, which can not be justly accorded to the acts of others, especially if those others be mere partisans.

The committee further go on to state that the laws of Pennsylvania tended to guard against the perpetration of the frauds alleged. Therefore the committee held that the *prima facie* presumption had not been overturned, and reported a resolution declaring the sitting Member entitled to his seat.

On September 11¹ the minority moved to substitute for the majority resolution a declaration that the seat should be declared vacant. This was decided in the negative, yeas 56, nays 110. Then the resolution of the majority, declaring Mr. Robbins entitled to the seat, was agreed to without division.

¹Journal, pp. 1444–1446.